

RALPH LUBITZ,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Stevens Point),**
Respondent.

DECISION
AND
ORDER

Case No. 95-0073-PC-ER

The Commission, having reviewed the Proposed Decision and Order and the record in this matter, and having consulted with the hearing examiner, has modified the Proposed Decision and Order to more accurately and completely reflect the record and to clarify the decision rationale. It should be noted that, in reaching this final decision, the Commission did not reverse or revise any of the hearing examiner's credibility determinations. The following represents the Commission's final decision and order in this matter:

NATURE OF THE CASE

This case is before the Commission on a complaint by Dr. Ralph Lubitz, alleging that respondent, University of Wisconsin System (Stevens Point) (UWSP), discriminated and retaliated against him in violation of the Fair Employment Act (FEA) and denied him his rights under the Family and Medical Leave Act (FMLA).

FINDINGS OF FACT

1. The complainant is a tenured faculty member in the Department of Psychology (Department), College of Letters and Science, University of Wisconsin-Stevens Point (UWSP). He began his employment there in 1972.
2. Beginning in 1987, after the death of his wife, and continuing through the fall of 1990, complainant requested and was granted a series of partial and full time

leaves of absence from work because of a mental health condition. Some were paid sick leave or "colleague coverage" leave, others were unpaid leave.

3. In January (spring semester) of 1991, complainant returned to work on a 70 percent time basis. Complainant requested and received approval to have his classes scheduled on only four days of the work week so that he could travel each Friday to Wausau, Wisconsin, for an appointment with his therapist for treatment of a mental health condition. In April of 1991, the Department advised complainant that it would oppose any future leave without pay requests beyond the fall semester of 1991, due to the impact his leaves had been having on the Department's ability to fulfill its teaching responsibilities to its students.

4. After increasing his work time to 75 percent in the fall semester of 1991, complainant returned to work full time in the spring semester of 1992, continuing with his four-day-a-week schedule. After he returned to work full time, complainant did not work on Fridays, did not work an alternative schedule during the week to make up for the work time lost on Fridays, and did not take leave for the Friday absences.

5. Complainant's use of sick leave during the spring semester of 1992 was unremarkable, but on April 17, 1992, the chair of the Department, Dr. Jack Holmes, wrote complainant concerning student complaints that he had failed to keep scheduled appointments with them or to provide adequate office hours so that they could schedule appointments with him.

6. In January of 1993, Dr. Holmes wrote complainant regarding student complaints that he failed to timely turn in his grades to the Registrar for mailing to the students.

7. Pursuant to a schedule established to evaluate the performance of tenured faculty, complainant was scheduled for review in the spring of 1994. This review process started in September of 1993 with a scheduled completion date of May 1, 1994.

8. The Review Committee charged with participating in this evaluation of complainant consisted of two Department faculty colleagues selected by complainant—

Dr. Nancy Bayne; and Dr. Dennis Elsenrath, who served as chairperson of this Review Committee.

9. Dr. Bayne, in the May 11, 1994, report she prepared as a member of this Review Committee, summarized her findings as follows:

To summarize, Dr. Lubitz is an excellent lecturer who teaches students to think about material in ways that facilitate real understanding. He continues to be engaged in research and scholarly activity and is slowly getting involved in the business of the department. It is expected that he will continue this progress in the coming years.

The concerns expressed by Dr. Bayne in her report are as follows:

. . . Students might find it useful to have a more detailed outline of topics to be covered in the course. . . .

. . . Due to illness during the Spring semester of this year, Dr. Lubitz has missed approximately two weeks of class, which has been of concern to some students. However, the health problems appear to be under control at this time. . . .

. . . Professor Lubitz has 35 advisees and has been slowly reintegrating himself into other departmental activities. He has begun to attend some department meetings and is running for membership on department committees for the 1994-95 academic year. It is hoped that this process will continue and the department will benefit from his perspective on important issues. . . .

10. Dr. Elsenrath, in the May 12, 1994, report he prepared as a member of this Review Committee, summarized his findings as follows:

In summary, Dr. Lubitz is an excellent teacher as measured by colleague observations and student evaluations. "He makes you think" is a common student comment. Dr. Lubitz has a great deal to offer students and colleagues. It is hoped that he will resolve his medical difficulties in a manner that allows full participation in teaching, service, and scholarship. His increased activity in these areas has been important to the total functioning of the department.

The concerns expressed by Dr. Elsenrath in this report are as follows:

. . . It would be helpful to let students know the number of exams and approximate test dates in order to help them organize their semesters. . .

. . . Dr. Lubitz needs to post at least three office hours to be consistent with university expectations. Additional office hours and possibly more variety in advising times will allow students easier access to him. . . .

. . . SERVICE: Dr. Lubitz began attending department meetings this past semester, although rather infrequently. Regular attendance is important along with committee participation. Dr. Lubitz has courageously submitted his name as a candidate for all four department committees for next year. It is hoped that he will assume regular participation at the department level through department meeting attendance and committee work and consider campus-wide and community involvement. . . .

. . . Dr. Lubitz has returned to regular classroom teaching over the past several years following a period of extended medical absence. His return has been very important to the department and psychology students. He has continued to experience health problems resulting in approximately two weeks of class absence this semester which has caused difficulties for students. This is a difficult issue, both for Dr. Lubitz and the students. Currently, Dr. Lubitz is doing well and is teaching his classes on a regular basis. . . .

11. Department rules require that a plan be developed to address any deficiencies revealed in a post-tenure review. Accordingly, Dr. Coralie Wells, the newly appointed chair of the Department, drafted a Tenure Review Plan (TRP) from the reports of the Review Committee, which was presented to complainant on May 26, 1994.

12. This TRP stated as follows:

As per College and Department Procedures (Section VIII, G., b.), the following plan is designed to address problems identified in your Tenure Review Report, May 12, 1994 and discussed with you at your Tenure Review meeting on May 13, 1994:

TEACHING

This area was clearly one of major strength. Classroom lectures and performance were judged above average. You are asked to address the following problems:

1. Provide students with more information on their grade requirements, specifically, how many tests they will be having for the Semester.
2. Provide the Human Subjects Pool Coordinator with appropriate grade information in a timely fashion so that your 110 students can be awarded their grades on time. (This issue was reported to me since our 5-13-94 meeting as a problem which existed for both semesters 93-94).
3. Address your health problems with the department chair as indicated below. Your frequent absences from classes are the most severe performance problem.

SERVICE

1. Post and hold a minimum of three office hours a week arranged at a time convenient for students, with an additional two hours added during advising periods.
2. Regularly attend and actively participate in department meetings.
3. Actively participate in department committee work. The department service workload can be evenly distributed if each faculty member is active on two committees. The department will be reorganizing the committee structure in the 1994-95 academic year to provide a better workload distribution for the heavy tasks we are facing. We look forward to your help.

PROFESSIONAL DISCIPLINARY GROWTH

1. Continue to do Independent Study Projects with at least two students per year. The inclusion of this objective in your work plan is subject to review pending the Vice Chancellor's new document defining Professional Disciplinary Growth.
2. Provide the chair and your review committee with a summary of your book which you are preparing for publishers before April 1, 1995.

At our meeting on May 13 when we discussed your frequent class cancellations and other performance deficits you cited health as the problem. You also stated that you did not consider yourself physically disabled and did not want ADA Office involvement at this point. Together we will monitor your health problems as they affect your

performance during 1994-95 academic year and review the health issue at the end of that period.

The department will continue the accommodation of providing you with a four day teaching and service work week so that you can visit your therapist on Fridays.

Your colleagues and I look forward to your full participation in the department.

Please let me know if there is any way I can assist you in implementing the plans listed above.

13. In May of 1994, during the course of discussions relating to his performance, complainant advised respondent that he did not suffer from a disability but that he was occasionally temporarily incapacitated by attacks of a migraine-equivalent condition.

14. In a memo to Dr. Wells dated November 25, 1994, Dr. Elsenrath stated as follows:

Drs. Lubitz, Bayne, and I met to review our report from last May. I am pleased to report that Dr. Lubitz has addressed the committee's recommendation to a significant degree. Following is a list of items addressed during our recent meeting:

1. Dr. Lubitz now informs his students of the number of exams and approximate test dates.
2. Dr. Lubitz now posts at least three office hours per week.
3. Dr. Lubitz posted additional hours during advising periods.
4. Dr. Lubitz has begun to attend department meetings.
5. Dr. Lubitz is now serving on a department committee.
6. Dr. Lubitz's plans for professional development activities this year include:
 - taking the initiative to set up the three channel "T" scope, including space arrangements necessary to support research

- continuing work on his book
- exploring participation in a learning conference

Overall, Dr. Lubitz has expressed a good degree of enthusiasm for his teaching. By his own account he is feeling more positive and energetic than he has in years. The committee will be available to Dr. Lubitz during this year as a source of support and encouragement.

15. In a memo to complainant dated November 28, 1994, Dr. Elsenrath stated as follows:

When I talked briefly with you today I was truly astonished at your reaction to the recent memo that I sent to the department chair regarding an update on your post-tenure review. You stated to me this afternoon that you objected to the memo because you had not approved it and that you were going to make a "stink." I was astonished because:

1. You, Nancy, and I met and discussed the very items contained in the memo with the clear intention of providing a follow-up statement to the department chair. As best I can determine, the content of the memo is factual and entirely consistent with the information you provided to Nancy and me. I discussed the memo with Nancy and she indicated support for the content of the memo.
2. The memo, as I read it, is complimentary and quite positive.
3. I gave the memo to you approximately four weeks ago and on two occasions asked for your reaction. On both occasions you indicated that you had not had a chance to read it. Given observations 1 and 2, I saw no reason to postpone providing feedback to the chair on this matter.
4. You indicated that you had not been able to locate me during the past two weeks to talk with me about the memo. Except for the Thanksgiving holiday, I have been in my office Monday through Friday the entire month of November. Furthermore, I remember saying hello to you in the hallway during the past several weeks, and sitting in a department meeting with you last Wednesday. All you had to do was say that you wanted to discuss the memo and Nancy and I would have arranged a meeting with you. You might also have sent a note. You gave no indication that you were going to respond. Given the factual nature of the memo and the fact that you had not responded, Nancy concurred with my decision to send the memo to the chair without your response.

5. I certainly recognize that post-tenure review is a disagreeable process for many faculty. Nancy and I have worked to be supportive, positive, and encouraging. I regret that you have taken offense to the way I have handled this matter.

A copy of this memo was sent to Dr. Bayne and Dr. Wells.

16. In a memo to Dr. Wells dated December 7, 1994, Dr. Elsenrath stated as follows:

Coralie, we (Ralph and Dennis) have discussed the November 28 memo and related matters and have come to an understanding.

We both reacted strongly to different aspects of the situation. After additional discussion we agreed again that the committee's report was fair, positive, and consistent with Ralph's views and with discussion that occurred during a follow-up post-tenure review committee meeting in which he actively participated. We are both satisfied that the matter has been resolved and look forward to a continuing working relationship. Please disregard the November 28 memo.

17. During the 1993-94 academic year, complainant was present for three Department meetings and absent for fifteen; during the fall semester of the 1994-95 academic year, complainant was present for three Department meetings and absent for three; and during the spring semester of the 1994-95 academic year, complainant was present for five Department meetings and absent for two.

18. Complainant's classes for the 1994-95 academic year were again scheduled on the first four week days. During the fall semester complainant took 3.5 days of sick leave on the following dates: Monday, 9/26/94; Monday, 10/31/94; Monday, 11/21/94; and Tuesday, 12/6/94. Complainant did not obtain colleague coverage for these absences nor re-schedule the classes canceled on these days.

19. At the beginning of the spring semester of the 1994-95 academic year, complainant was on sick leave for five days on the following dates: Monday, 1/30/95; Tuesday, 1/31/95; Thursday, 2/2/95; and Monday, 2/20/95. Complainant obtained colleague coverage from Dr. Bayne for one-half day during these absences. Complainant did not re-schedule the classes canceled on these days. During the 1994-

95 academic year, complainant's absences averaged one day per month; and the average for the Department faculty was 0.02 days per month.

20. On February 17, 1995, a parent who was also a UWSP faculty member, complained to Dean Justus Paul of the College of Letters and Science that complainant had missed five of the first twelve scheduled sessions of his child's spring semester class. Dean Paul referred the matter to complainant's department chair, Dr. Wells, for investigation. On the evening of February 20, 1995, Dr. Wells visited complainant's home and, as directed by Dean Paul, discussed the parent's complaint with the complainant.

21. On February 23, 1995, complainant went to Dean Paul's office to explain and discuss his absences from the classroom. Complainant agreed to provide medical documentation for his absences. Dean Paul advised complainant that he realized that illness could not be avoided, but UWSP needed to make certain that their students received the instruction which they had been promised and for which they had paid. During this meeting, Dean Paul also requested medical documentation of complainant's condition, including limitations on his ability to work, his prognosis, and accommodations he might require. Complainant felt this request was reasonable and proper.

22. On March 15, 1995, complainant provided Dean Paul a letter from his physician, J. Eric Ahlskog, M.D. Dr. Ahlskog had seen complainant in person only once, on August 25, 1994, and had been the last neurologist to see complainant at the Mayo Clinic. Previously, complainant had been treated by Dr. Ahlskog's colleagues. Dr. Ahlskog stated in this letter, which he had dated March 7, 1995, as follows:

Dr. Ralph Lubitz has been followed at the Mayo Clinic for episodes of migraine equivalent attacks that have been recurrent over many years. Once the diagnosis was established and the appropriate anti-migraine treatment was initiated several years ago, there was substantial improvement in the severity and duration of the attacks. During the several days of each episode, Dr. Lubitz is incapacitated with severe vertigo which precludes carrying on with the usual days' activities. He recently experienced somewhat of a prolonged attack, despite continuation of the previously initiated anti-migraine medication. For

that reason, he has added a second medication at my recommendation. I am expecting further substantial improvement with the initiation of this second drug. It should also be noted that migraines and related symptomatology typically improve around middle age. Hence, I am somewhat optimistic that Dr. Lubitz is going to experience some spontaneous improvement in his condition due to age-related factors.

In preparing this letter, Dr. Ahlskog had no knowledge of complainant's absences from his employment at UWSP or the reasons for such absences, except as reported to him by complainant in the following contacts: on February 22, 1995, complainant telephoned Dr. Ahlskog but did not reach him so left a message; Dr. Ahlskog returned the call, but there was no answer; on February 25, complainant wrote Dr. Ahlskog requesting a letter to Dean Paul regarding his health condition; by telephone on March 2, 1995, complainant told Dr. Ahlskog he'd had a prolonged absence from work and needed a letter to clarify his health condition.

23. The letter to Dean Paul from Dr. Ahlskog was the only information relating to his health condition provided by complainant in response to Dean Paul's request.

24. Uncontroverted expert medical testimony at hearing indicated that complainant suffers from probable migraine variants, including episodes of vertigo which might last from one hour to three days and occur three to four times a year; and that these episodic attacks are temporarily disabling and render complainant incapable of functioning during the period of the attack.

25. After several discussions with Associate Chancellor Meyer, Dean Paul, and Personnel Director Roland Juhnke, Dr. Wells advised complainant, by memo dated April 14, 1995, that he was required to provide medical verification for future absences due to illness. Similar requirements had been imposed on at least two other Department faculty members with records of absences or use of leave time comparable to complainant's.

26. Prior to April 20, 1995, Associate Chancellor Meyer, Dean Paul, and Personnel Director Juhnke had concluded that complainant's four-day work week

conflicted with state and UW requirements that employees work a forty-hour work week, generally spread over a period of five days, and that leave time be taken for absences. This issue had become one of greater concern at that time as legislative attention had been directed to the work hours of UW System faculty. Although the UWSP administration tried to accommodate the class scheduling requests of its faculty, such requests could not always be accommodated. In addition, this practice did not modify the requirement that full-time faculty members put in a forty-hour work week generally spread over five days. No other full-time faculty member had been granted a guarantee that no classes would be scheduled on a particular work day; or provided a day off each week with no requirement that an alternative schedule be established to make up the time or that leave time be taken. Complainant had not been working a forty-hour work week, had not been working a five-day week, and had not been taking leave time for his absences each Friday.

27. In a memo to Dr. Wells dated April 19, 1995, complainant provided his perspective as to his progress on his TRP. He wrote as follows:

1. Number of tests and approximate test dates
My students were always informed of the number of exams to be given. My syllabi now also include approximate exam dates.
2. Office hours
I now post three office hours a week and provide additional hours by appointment.
3. Advising hours
During the advising period, I provide advising hours during the morning, early, and late afternoon. Apparently, these were enough to accommodate the more than 40 students I saw last semester.
4. Attendance at department meetings
My attendance continues to improve. This semester I missed only one meeting.
5. Department committees
I am now a member of one of the department's standing committees.

6. Community involvement

For some years, I have been a member of the local democratic party. Last semester, I was asked to run for the alderman's seat of the fifth ward. I am secretary-treasurer of the Portage County Community Garden Association.

7. Research

So far, I have not done any research this year. However, I have begun to look for space to set up the department's projection tachistoscope in order to begin research on processing information from pictures. I also began to collate a very large quantity of data I have collected over the last several years from my research on picture-priming. How soon I will continue my work on methods of teaching perceptual-motor skills to adults depends on being able to find a suitable research assistant.

8. Writing

I continue to work on my book on Learning although the pace is very slow. I will probably apply for a sabbatical leave in order to make greater progress.

9. Learning conference participation

The learning conference I had hoped to attend this year has been discontinued. However, I have renewed my membership in the APA to locate other conferences I might wish to attend.

10. Absences due to illness

Although I am not incapacitated, I have an incapacitating illness. My doctor at Mayo Clinic is optimistic that with appropriate combinations of medication and having reached middle age, I will continue to make "further substantial improvement" and my absences from class will become less frequent.

28. Complainant and Dr. Wells met on April 20, 1995, to discuss complainant's progress in meeting the goals of the TRP. In a memo to complainant dated May 1, 1995, Dr. Wells stated as follows:

Below please find the written review of issues discussed in our meeting of April 20, 1995:

TEACHING

Teaching is a strong area of performance relative to the other two areas of contractual obligations. My classroom observation on April 17, 1995 confirmed the satisfactory May 1994 report of your colleague committee.

Problems one and two listed in your May 26, 1994 developmental plan (attached) have been addressed and remedied.

Area three in the same document: "Address your health problems with the department chair Your frequent absences from classes are the most severe performance problem" continues to be an issue. On February 17 and 19, 1995 Dean Paul contacted me concerning a parent's complaint about your absences from classes in January and February. I had no information about your health or colleague coverage and could not reach you by phone all day. Finally on the evening of February 20 I went to your home and you did not answer the doorbell. I went to the back of the house and finally got your attention by tapping on the kitchen window where you were alive and well doing dishes. The eight days of absences this year is an improvement over the two weeks reported for semester II, 1994 in your colleague report. However, your pattern of absences over the past several years continues to be a problem and one that has required administrative intervention during your review period.

Further, at our April 17, 1995 meeting I informed you that I could no longer give you the four day week accommodation mentioned in your May 26, 1994 Review memo. The four day work week is in conflict with UWS 19.01, Wis. Adm. Code, sections 10.03 and 10.04. You were quite resistant to working a five day week on the basis of your mental health needs.

SERVICE

You have fulfilled condition one in your Service plan, and since Dean Paul's intervention about the parental complaint have added some morning hours for your students.

Your attendance at department meetings was sporadic and minimal first semester, but since Dean Paul's admonitions concerning your work performance in March, 1995 attendance has been regular.

You have served on one department committee. The chair of that committee has evaluated your involvement as minimal.

I asked you about any other department service and you said you had none. I mentioned your failure to respond to the department requests for Learning questions for our Specific Discipline Assessment mandated by the Regents. You said you would do it "eventually."

PROFESSIONAL DISCIPLINARY GROWTH

Your revised disciplinary growth plan submitted in November, 1994 stated that you were going to set up the "T" scope apparatus, work on your book, and explore participation in a learning conference.

In April, 1995 you began looking for space for the scope as the end of your review period approached. In the Fall of 1994 you wrote an undergraduate education initiative for "T" scope research work with your students. Your proposal was rejected by Bill Johnson because it was too vague and lacking in focus, and judged likely not to be implemented. At the time I told you Mr. Johnson was willing to help you develop an appropriate proposal. You did not follow up this funding source. Mr. Johnson is also very helpful on issues of space and labs.

You report work on a book and contact with publishers, but have provided no documentation for this activity as required by tenure review procedures.

You have not attended any professional conferences.

CONCLUSIONS

Your colleagues set up a minimal set of performance standards for your peer review to help integrate you back in the department after a long medical absence. These standards were neither normative nor optimal. You did not fulfill even these minimal performance demands. You have also been uncooperative in the review process itself, at times becoming rude to your committee chair and myself, even attempting to bar me from class observation.

Your most serious problem remains simple attendance at work.

I hope in the future we can work together to help you become a fully functioning member of the department.

The representations in this memo accurately represented the substance of the discussion at the April 20, 1995, meeting between complainant and Dr. Wells; and accurately described complainant's performance during the review period. This was the second unsatisfactory performance evaluation received by complainant.

29. Following complainant's TRP meeting with Dr. Wells on May 20, 1995, Dr. Wells and Dean Paul met and set up a development plan for complainant's 1995-96 academic year. This 1995-96 development plan was provided complainant in a memo from Dr. Wells dated May 22, 1996, which stated as follows:

As per Department Procedures Section XIII, H.2.b., Dean Paul and I have met and set up the developmental plan for you for the 1995-96 academic year. I would like to discuss this with you and have you sign it in a meeting with me this week, no later than Friday, May 26, 1995. Please call Kristy and arrange an appointment as soon as possible.

TEACHING

1. Meet all scheduled class sessions. Provide written information from an M.D. for all absences due to illness prior to your return to work. Absences not due to illness must have prior approval from the department chair. Unexcused absences from scheduled classes may result in a proportional reduction in pay.
2. Continue to provide students with complete syllabi, including all necessary information on grade requirements, testing and dates for tests.

SERVICE

1. Post and hold a minimum of three office hours a week arranged at a time convenient for students, with an additional two hours added during advising periods.
2. Regularly attend and actively participate in department meetings.
3. Actively participate on department committees.
4. Organize materials in the Spindler Lab so that the room can be used as working space for student and faculty research use.
5. Select additional self-initiated activities as indicated below.

PROFESSIONAL DISCIPLINARY GROWTH

1. By June 1, 1995 provide chair with technical needs data for the computer upgrade you requested.
2. By August 28, 1995 provide chair with a work activity time line for scholarly activity during the 1995-96 academic year. By April 1, 1996 provide the chair with publications, grant proposals or other proof of scholarly activity.

In addition to the above, select additional activities so that you may achieve a meritorious performance level for future salary increases, at the minimal level of the bottom quartile of either the department's Service (21 merit points) or Scholarship (10 merit points) for the 1994-95 merit rankings.

I will meet with you in October and December and twice early in the spring semester prior to April 1, 1996 to monitor your performance. This monitoring will include classroom observations and materials for review as indicated in the Vice Chancellor's 7-19-94 memo on Peer Evaluation of Faculty.

I hope this plan will help us put the past behind us and move forward. Your students and colleagues need your many talents in these challenging times.

Complainant signed this memo on May 26, 1995.

30. For the fall 1995 semester, of the fifteen Department faculty scheduled to teach classes, five, not including complainant but including Dr. Wells, were scheduled to teach five days a week. For the spring 1996 semester, of the fifteen Department faculty scheduled to teach classes, seven, including complainant and Dr. Wells, were scheduled to teach five days a week.

31. In the spring of 1995, UWSP awarded faculty merit pay for academic year 1994-95 based on faculty performance during calendar year 1994. In a memo to Vice Chancellor Thoyre dated May 8, 1995, Dean Paul stated as follows in regard to his proposed award for complainant:

The Department of Psychology has submitted its merit recommendations for 1994-95. The forms are attached to this memo. In the forms, you

will note that Dr. Ralph Lubitz was assigned 8 merit points by the department, in conformity with its new procedures for determining meritorious performance. That process, though a bit complicated, essentially requires self-reporting of activities in all of the three areas in which we normally judge faculty performance and then assign points to each of the separate categories. 100 points was the highest possible score and those obtaining more than 25 points were to be judged meritorious. Dr. Lubitz scored a little above the 25 number and was given 8 points, the lowest number assigned by the department.

Apart from normal merit process, Dr. Lubitz was being reviewed by his post-tenure review committee (Dr. Elsenrath, Dr. Jack Holmes, and Chair Coralie Wells) as a follow-up to last year's unsatisfactory review. The committee's report, though noting some improvements, felt that Dr. Lubitz' overall performance continued to be unsatisfactory. They will recommend specific steps for improvement.

As a result of the unsatisfactory post-tenure review, Chair Wells submitted a separate recommendation on merit which asked that Dr. Lubitz NOT receive any merit. Her memo is also attached.

After speaking with Dr. Wells, I spoke with Dr. Elsenrath about the post-tenure review and his assessment of the performance of Dr. Lubitz. While I believe that Dr. Wells is justified in the recommendation she has made and could support it, I have been persuaded to offer yet another recommendation.

I recommend that Dr. Lubitz receive one-half of the merit points assigned to him by his department as a result of his unsatisfactory post-tenure review. That would, if accepted, result in giving him 4 points. I suggest this so that Dr. Lubitz will recognize that we do see some improvement in his performance since we began his review, but also to make it clear to him that we expect to see continued improvement from now on. I would urge that a strong statement be sent to Dr. Lubitz concerning the prompt resolution of the difficulties discussed in his post-tenure review report. It must be made clear to him that his performance **MUST CONTINUE TO IMPROVE OR THE LIKELIHOOD OF FURTHER SALARY ADVANCES WILL BE VERY LIMITED.**

Vice Chancellor Thoyre accepted Dean Paul's recommendation.

32. The concerns UWSP management had relating to complainant's absences did not relate to his absences *per se*, but to his failure to obtain colleague coverage for

his canceled classes, to re-schedule such canceled classes, or to increase his availability to students through such mechanisms as increased office hours, to make up for the classes canceled as a result of his absences. UWSP management believed that students who registered for and paid for a class deserved the hours of instruction that UWSP had represented the class would provide, and established and implemented UWSP's policies accordingly.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and 103.10(12), Stats.
2. Complainant has the burden to show that he was discriminated against on the basis of handicap or was retaliated against for engaging in protected fair employment activities as alleged.
3. Complainant has failed to sustain this burden.
4. Complainant has the burden to show that his rights under the Family and Medical Leave Act (FMLA) were violated, or that he was retaliated against for engaging in protected FMLA activities as alleged.
5. Complainant has failed to sustain this burden.

OPINION

The issues to which the parties agreed are as follows:

- A. Whether respondent discriminated against complainant on the basis of his handicap (migraine-like condition) in regard to the following terms and conditions of employment.
 1. 4/20/95 respondent requirement for complainant to provide written verification.
 2. 5/1/95 negative performance evaluation.
 3. 5/1/95 respondent order for complainant to return to a five-day work week.

4. 5/16/95 receipt of only 4 merit points.
 5. 5/22/95 decision not to excuse complainant missing future teaching classes regardless of reason for the absence.
- B. Whether respondent retaliated against complainant for his participation in the claimed protected FEA activity of taking and/or requesting the following as accommodation for his handicap: (1) a 4-day work week (starting in January of 1991), and (2) sporadic leave from teaching classes (during 1994-95); all in regard to the same 5 adverse actions as alleged in A. above.
- C. Whether respondent violated the family and medical leave act (FMLA) in regard to the same 5 adverse actions as alleged above.

It should first be noted that, in regard to adverse action 5., the record does not show that such a condition was ever placed on complainant's absences, and this adverse action will not be considered further here.

Handicap Discrimination

In *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88, the Commission set forth the method of analysis of a handicap discrimination claim as follows:

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

The first question under *Harris* then is whether complainant's migraine-equivalent condition qualifies as a handicap. Section 111.32(8), Stats., provides as follows:

"Handicapped individual" means an individual who: (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; (b) has a record of an impairment; or (c) is perceived as having such an impairment.

It seems incongruous for complainant, who insisted repeatedly to respondent, in regard to the condition which was responsible for his absences, i.e., his migraine-equivalent condition, that he was not disabled, to argue now that this condition is indeed a handicap and that respondent regarded him as handicapped. However, in reviewing state and federal case law, it is concluded that complainant has shown that he has a handicap within the meaning of the Wisconsin Fair Employment Act (FEA). Federal courts, in applying the Americans with Disabilities Act to a migraine condition, have focused on the impact on the employer of the complainant's record of absences resulting from the condition. (*See, e.g., Howard v. North Mississippi Med. Ctr.*, 5 AD Cases 1723 (D.C. NMiss 1996); *Carlson v. INACOM Corp.*, 4 AD Cases 600 (D.C. Neb 1995)). This, however, relates more directly to the third and fourth steps of the *Harris* analysis. In view of the conclusions in these ADA cases that suffering from migraine headaches is a physical impairment that could interfere with the major life activity of working, depending on the factual record; the record here shows that complainant's migraine-equivalent attacks totally incapacitate him during the period of the attack; and Wisconsin case law under the FEA which holds that an episodic condition can be a handicap (*see, e.g., Squires v. LIRC*, 97 Wis. 2d 648 (Ct. App. 1980)), it is concluded that complainant is handicapped within the meaning of the FEA.

The next step in the *Harris* analysis would be to determine whether respondent discriminated against complainant because of his handicap. Handicap discrimination may be established either by showing that the employer's actions were directly motivated by the employee's handicap, or that they were based on performance reasons

that are causally related to the employee's handicap. *Jacobus v. UW*, 88-0159-PC-ER, 6/29/87; *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87. Each of the remaining adverse actions is discussed below utilizing this framework:

1. Written medical verification of absences.

The most important factor here is that similar verification requirements were imposed on other UWSP and Department faculty with records of absences and use of leave comparable to complainant's. An employer has a right and a public employer has an obligation to establish attendance requirements for its employees. The Commission has recognized that this would include requirements relating to medical verification of health-related absences for those employees whose absences exceed the norm, and has concluded that such a requirement does not constitute handicap discrimination. *Bell-Merz v. UW System*, 90-0138-PC-ER, 3/19/93. Here, the record shows that complainant's history of absences exceeded the norm for faculty members of the Department, and that he was treated in a similar manner in this regard as other faculty members with comparable absence or leave records. Complainant has failed to show handicap discrimination in regard to this adverse action.

Although not argued by the parties, the Commission notes that the pattern of complainant's absences during the 1994-95 academic year is inconsistent with a conclusion that all these absences were due to complainant's migraine-equivalent condition as he has claimed. Medical testimony established that the attacks resulting from complainant's migraine-equivalent condition rendered complainant totally incapacitated during the period of the attack which lasted from one hour to three days, and occurred three to four times a year. In the fall of 1994, the absences complainant claims were due to his handicapping migraine-equivalent condition occurred on a Monday in September, a Monday in October, a Monday in November, and a Tuesday in December. Complainant would have had to experience four separate attacks in order for this record of absences to have resulted from his migraine-equivalent condition. In addition, a pattern of four absences which includes three Mondays, particularly here

where complainant did not work on Fridays, suggests something other than coincidence. In the spring of 1995, the absences complainant claims were due to his migraine-equivalent condition occurred on a Monday, Tuesday, and Thursday during the same week in January; and two consecutive Mondays in February. Again, this pattern of absence on Mondays suggests a possible pattern of sick leave abuse, and is inconsistent with a finding that all these absences were due to attacks of complainant's migraine-equivalent condition. As a result, it is concluded that the medical verification requirement was imposed in part due to absences not attributable to complainant's handicap, and in part due to a pattern of absences consistent with a conclusion of sick leave abuse, and complainant has failed to show that he was treated differently in this regard than any of his fellow faculty members.

2. Negative performance evaluation (5/1/95)

Complainant argues here that, since his absences were the basis for his negative evaluation and since his absences resulted from his handicap, then his negative evaluation was the result of his handicap and he was discriminated against in this regard. *This argument ignores several key findings. The most important of these is that it was not complainant's absences per se which concerned respondent, but complainant's failure to make up to his students for the classes canceled as a result of his absences. Complainant had the opportunity to do this through colleague coverage, re-scheduling of the classes, and/or increased availability to his students through the scheduling of additional office hours, but, in the fall of 1994 and the spring of 1995, he obtained colleague coverage for only one-half day out of eight, and the record does not show that any of the canceled classes were re-scheduled or that he scheduled any office hours in excess of the minimum number required by the Department. The record shows that UWSP administration took very seriously its teaching obligation to its students, and uniformly applied its policy of striving to give students what they had paid for through their tuition. This argument by complainant also ignores the fact that complainant's absences were only one factor in the negative evaluation and that, despite*

detailed critiques and plans developed by his peers and the Department chair, complainant had actually made little progress in curing the deficiencies in his teaching, scholarship, and service. Complainant has failed to show that the deficiencies cited in this evaluation did not represent the realities of his performance during the review period, or that respondent's expectations for complainant's performance were not reasonable for a full-time, experienced faculty member and consistent with the expectations imposed on other full-time Department faculty. In fact, it appears from the record that such expectations were fairly minimal, given complainant's full-time status and years of experience. Finally, as discussed above, complainant has failed to show that all of his absences during the 1994-95 academic year were due, as he has claimed, to his handicap. Complainant has failed to demonstrate handicap discrimination here.

3. Return to the five-day work week.

The record shows that this action was taken to avoid conflicts with state work hour and leave reporting requirements, and to treat complainant in the same manner as his colleagues with regard to the scheduling of classes. Recent legislative attention directed to faculty work hours focused respondent's attention on the work hours of all its faculty. In reviewing complainant's schedule, it was concluded that allowing complainant to take every Friday off with pay but without an approved alternative schedule and without charging a paid leave account, was inconsistent with state leave/work hour requirements and was inconsistent with the standard to which all other faculty were held. The record does not show that any other faculty member had been offered a schedule with a day consistently set aside on which no classes were scheduled and no work required and no leave taken. Instead, the record shows that this action brought complainant's schedule/work hours in line with those of other faculty members. Complainant has failed to show handicap discrimination in this regard.

4. Merit pay.

This analysis tracks that of the negative performance evaluation adverse action, i.e., that it was not complainant's absences *per se* which were the subject of respondent's concern but complainant's failure to make up to his students for the canceled classes; that the evaluation accurately reflected complainant's performance during the review period; and that complainant has failed to show that all of his absences during the 1994-95 academic year were due, as he has claimed, to his handicap. Complainant's performance evaluation was essentially the basis for the award of merit points/pay to complainant. It should be noted in this regard that complainant's raw score of 33, which was the lowest in the Department, was based on his own reporting of his activities. Again, this is not a score that would be expected of a tenured, full-time, experienced professor, and complainant's award of merit points/pay reflects this as well as respondent's continuing effort to bring complainant's performance into line with expectations. Laying to one side the question of whether complainant has shown that his absences during the 1994-95 academic year resulted from his handicap, he has failed to show that this award of merit points/pay was related to his absences *per se*, was inconsistent with the level of performance complainant exhibited during the review period, or was inconsistent with the relationship between merit pay and performance for other Department faculty and, as a result, complainant has failed to show handicap discrimination.

If complainant had succeeded in demonstrating handicap discrimination, the next step in the *Harris* analysis would be to determine whether respondent can take advantage of the exception stated in §111.34(2)(a), Stats. The record here establishes that, during his migraine-equivalent attacks, complainant was totally incapacitated and absent from the work place. Clearly, this shows that complainant's handicap interfered with his ability to adequately undertake the job-related responsibilities of his position, and the exception would attach.

Finally, then, respondent would have to show that it reasonably accommodated complainant's handicap, or that no reasonable accommodation was available. It is obvious that, if the impact of a handicap is absence from work due to total incapacity,

it is not possible to structure the job or the work environment so that the employee can be present and able to perform his job duties. In view of the medical testimony establishing complainant's total incapacity and inability to attend work during his attacks, and of the obvious fact that a teacher's presence in the classroom is necessary in order for them to teach, respondent has succeeded in showing that no reasonable accommodation was available which would enable him to teach during his periods of incapacity. Respondent did, however, permit complainant to make up the classroom time he missed due to his migraine-equivalent condition and this would constitute a reasonable accommodation.

Complainant has failed to show that respondent violated the FEA in regard to his handicap.

Family and Medical Leave Act

Complainant asserts here not that respondent improperly denied him the use of FMLA leave, but that respondent retaliated against him for requesting leave under the FMLA in regard to the adverse actions cited above.

However, in order to obtain the protection of the FMLA, an employee is required to show that he suffers from a "serious health condition." Section 103.10(1)(g), Stats., defines such a serious health condition as:

. . . a disabling physical or mental illness, injury, impairment or condition involving any of the following:

1. Inpatient care in a hospital, as defined in §50.33(2), nursing home, as defined in §50.01(3), or hospice.
2. Outpatient care that requires continuing treatment or supervision by a health care provider.

In *MPI Machining Div. V. DILHR*, 159 Wis. 2d 358, 464 N.W. 2d 79 (1990), the Court stated that "the term 'continuing treatment or supervision by a health provider' in the FMLA contemplates direct, continuous and firsthand contact by a health provider subsequent to the initial patient contact." Complainant's circumstances here do not fit

this interpretation of the term. Complainant's contacts with Dr. Ahlskog in the spring of 1995 were by phone and letter and did not involve any direct contact for the purpose of treatment or supervision of complainant's migraine-equivalent condition.

FEA Retaliation

In order to invoke protection from this type of retaliation, an employee must show that he engaged in a protected fair employment activity. Apparently, complainant considers his requests for leave for his absences during the 1994-95 academic year, and his request for a four-day work week in order to attend therapy sessions, as his protected activities. It is difficult to conclude that such requests for leave would satisfy any of the criteria of §§111.322(2m) or (3), Stats., particularly since it has been concluded above that the leave would not qualify as FMLA leave. It is also puzzling that complainant characterizes his request for a four-day work week as a request for accommodation of a handicap since he did not claim a mental health condition as a handicap in 1994 or 1995, the time period relevant to the adverse actions at issue here. It should also be pointed out that complainant first requested this four-day work week in 1991, but does not allege that he was retaliated against for making such a request until 1995, which renders exceedingly weak any argument that there is a causal connection here.

However, if complainant did engage in a protected fair employment activity, the following analysis would apply:

In order to establish a prima facie case of FEA Retaliation, complainant must show that: 1) he engaged in a protected activity, 2) the employer subsequently took an adverse action against complainant, and 3) a causal link exists between the protected activity and the adverse action. *Acharya v. Carroll*, 152 Wis.2d 330, 340, 448 N.W.2d 275 (Ct. App. 1989) It will be assumed for purposes of this analysis that complainant has met the first element of his prima facie case because he requested leave for his migraine-equivalent condition and accommodation for a mental health condition.

The first alleged adverse action was respondent's decision on April 14, 1995, to require complainant to provide written verification of his future absences due to illness. Respondent has shown a legitimate, non-retaliatory reason for requesting verification (as has been discussed previously) and at the time the verification requirement was imposed, complainant agreed such action was reasonable. Accordingly, complainant failed to persuade the Commission that this action was due to FEA Retaliation.

The second alleged adverse action was the negative performance evaluation on May 1, 1995. Complainant has not shown that a causal connection exists between his request for leave or for accommodation and the negative performance evaluation. As explained previously, the poor performance evaluation was based on complainant's failure to make up missed classes and not because he requested any leave or accommodation.

The third alleged adverse action was the April 17, 1995, order for complainant to return to a five-day work week. Complainant has not shown that a causal connection exists between his request for leave or for accommodation and the requirement of a five-day work week. The five day work week was imposed due to requirements applicable to all staff, as previously explained.

The fourth alleged adverse action was the May 16, 1995, receipt of four merit points. Complainant has not shown that a causal connection exists between his request for leave or accommodation and the merit points received. As explained previously, the reduced merit points were given because of complainant's failure to make up his missed classroom time. The evidence is insufficient to conclude that retaliation played a part in the merit points decision.

ORDER

This complaint is dismissed.

Dated: January 7, 1998

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STATE PERSONNEL COMMISSION


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DONALD R. MURPHY, 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