

MEGAN GURRIE,
Complainant,

v.

**Attorney General, DEPARTMENT OF
JUSTICE,**
Respondent.

FINAL
DECISION
AND ORDER

Case Nos. 97-0083-PC-ER, 98-0130-PC-ER

NATURE OF CASE

These complaints were consolidated for hearing. The issues for hearing are as follows:

97-0083-PC-ER

Whether respondent discriminated against complainant by failing to accommodate her disability when her work location was changed on January 2, 1997, and when she was not informed of a transfer opportunity while she was on leave.

98-0130-PC-ER

Whether respondent discriminated against complainant on the basis of disability . . . in connection with her alleged constructive discharge. (Conference Report dated September 4, 1998)

FINDINGS OF FACT

1. Complainant was employed by respondent in a position classified as Program Assistant 2 (PA 2) as an operator in the "Handgun Hotline" program in the Crime Information Bureau (CIB) from July 11, 1994, until she resigned her employment effective September 15, 1997.

2. Complainant was supervised by Mary Westra.

3. At all relevant times complainant has been mentally ill (depression), which has constituted an impairment which has made achievement unusually difficult and limited her capacity to work.

4. When complainant commenced her employment with respondent she completed a "Disability Self-Identification" form. The question on that form "Are you a person with a disability?" has spaces for a yes or no answer. Complainant did not answer this question, nor did she answer any other questions on this form.

5. From the beginning of her employment with respondent, complainant experienced difficulties in working with two co-employees, Sandy and Abby. Complainant complained to Ms. Westra about the behavior of these employees. These complaints were both verbal and written. An example of these complaints is a November 29, 1995, letter from complainant to Ms. Westra (Respondent's Exhibit 109), which includes the following:

Today Sandy accused me of taking all the cards to query just so I wouldn't have to do this new project. (She didn't want the cards, of course.) She complained that she & Abby & Kim got stuck doing all of the last project.

I told her you told me to get the jackets automated and the cards queried (from the drawer in the hotline room) before working on the project.

Is what I do any of her concern?

Is the day shift superior to the night [complainant's] shift?

It's finally gotten to the point that I can't take it. I've tried, I've really tried to just look the other way and keep minding my own business without being affected.

This hostile work environment has taken its toll on my mental health with anxiety and depression, as well as my physical health with migranes [sic] and nausea.

I am going to apply for a lateral transfer in January. I don't know if anything will be available, but I'm going to try.

I love my job, and working for you. There are many wonderful things about working for the Hotline. But unfortunately I cannot include my co-workers (for the most part) in my list of reasons to stay here. They are the **ONLY** thing on my reasons to leave list, but the toll they've taken on me has outweighed all the wonderful things about this job.

I do not expect you to take sides in this matter. I am more than aware of the fact the EVERYONE points fingers at each other.

I am enclosing a list of my grievances, mainly against Sandy and Abby. I have avoided any observations about their behaviour [sic] that isn't aimed at me or doesn't directly affect me.

I don't know if it will help at all, but if you need something in writing, here it is.

1. Lack of professional courtesy to co-workers.
2. Lack of professional demeanor with gun dealers.
3. Lack of self-designated personal boundaries.
4. Lack of respect for my personal boundaries and space.
5. Lack of any recognizable work ethic.
6. Sabatage [sic] of my work, recurrence on 11/24/95.
7. Lack of trust. (I can't so much as leave a pile of pennies in my desk, or food, or soda, without some disappearing.)
8. Lack of respect (even indifference would be welcomed) for me and my work.
9. Interference with my job performance.
10. Open scrutinization of the type of tasks I'm doing and the method in which I go about doing it; trying to tell me what I should be working on, when Mary's already told me what to do. 11/29/95 recurrence.
11. Personal items left in open workspace after shift ends.
12. Lack of ability to follow supervisor's guidelines, and inflicting anger or resentment upon me when I follow the rules as they were given to me.
13. Gossip, Gossip, more Gossip. This would cover Sandy, Abby, and Cindy who all mind other people's business more than they do their own. No one is safe from these three, as they tell stories to and about everyone, in our unit and beyond.

6. On January 3, 1997, complainant came to work to find that her desk had been moved from a location relatively close to Ms. Westra's office to a desk between Sandy and Cindy (another co-worker).

7. Ms. Westra's reason for moving complainant's desk was that a new employee had been hired and Ms. Westra wanted her relatively close to her (Ms. Westra's) office for training and orientation purposes.

8. Complainant complained to Ms. Westra about the new arrangement, commenting that Sandy was “toxic” to her. Ms. Westra and complainant engaged in a verbal dispute over this and related matters. Ms. Westra did not change her decision about using complainant’s desk for the new employe, but she did offer complainant other desk assignments as alternatives to the desk next to Sandy.

9. As a result of complainant’s complaint to Ms. Westra about the office rearrangement, Ms. Westra offered to move complainant to another office (the “hotline room”) where she would not be located near Sandy’s desk, and would be in a different office than Sandy. Complainant declined this offer. Ms. Westra also arranged to have room dividers placed between complainant’s and Sandy’s desks.

12. Ms. Westra also offered to allow complainant to switch desks with Cindy, which would have moved Cindy next to Sandy, and complainant further away from Sandy. Complainant declined this offer because she felt, based on a conversation she had with Cindy, that she (Cindy) did not really want to do this, notwithstanding that Cindy had offered to move to Ms. Westra.

13. Complainant also complained to Ms. Westra that co-workers were playing radios on their desks too loudly, and were spending excessive amounts of time in non-business conversations. Complainant did not inform Ms. Westra that her concerns related to the office rearrangement were causally related to her mental illness or a related problem.

14. Shortly after her initial hiring, complainant had told Ms. Westra that she needed instructions to be repeated due to the neurological effects of a head injury she had sustained in a car accident. Ms. Westra had complied with complainant’s request.

15. At complainant’s request, respondent granted her a leave of absence for medical reasons, effective February 18, 1997. The “Certification of Health Care Provider” form which complainant submitted in support of her request, included the following comments by her psychiatrist, Dr. d’Oleire: “Ms. Gurrie carries diagnosis of major depressive disorder which requires ongoing treatment.” In response to a question on the form about the likely duration of complainant’s incapacity, Dr. d’Oleire

stated: "Major depressive disorders are sometimes recurrent. At this time it is difficult to predict course." Dr. d'Oleire also stated that complainant was "unable to perform work of any kind." She further indicated that once complainant was able to return to work, she might benefit from working part time as opposed to full time.

16. In a February 20, 1997, note, Dr. Robert Bruns, M.D. (specialty, if any, unknown), stated that complainant "is suffering extreme mental stress due to a hostile work environment, and will not be able to return to work until proper treatment is accomplished."

17. On February 24, 1997, a contractual grievance was submitted on complainant's behalf. The grievance stated as follows:

Employer failed to manage & direct employees in this unit by not having a supervisor present at all times during this shift, failed to take appropriate disciplinary action when just cause was obviously present, and undermined the union by not informing the employee in this case of the appropriate steps for filing complaints/grievances, allowing the employee to file complaints/grievances against employees in the same bargaining unit without having a representative of the union present. Work rules are not applied uniformly to all employees in the work unit. Empty threats are made by the supervisor. Policies (new) are not reduced to writing and provided to the union or the employees of the unit. This employee had been threatened with placement on the employee assistance program, by the supervisor. This supervisor failed to inform the union of it's awareness that this employee had personal problems which were affecting her performance/attendance, and that the employee might need the assistance of the EAP. See attached exhibits (9) as they relate to more specific incidents.

Relief sought: 1) Reassignment/removal of Mary Westra as supervisor of the Handgun Hotline, to a position which does not oversee the activities of any member or employee represented by the Wisconsin State Employees Union. 2) Transfer of employee to another position in the same classification. 3) Restoration of all lost time and benefits (sick leave, vacation, Saturday holidays included) retroactive to November 1, 1995. 4) Reimbursement for travel and other out of pocket expenses which have been/may be incurred as a result of need for treatment by physicians. 5) Be made whole.

18. Respondent attempted to hold a hearing on this grievance, but this never occurred due to complainant's medical leave of absence, and/or her union representative's unavailability.

19. In a letter dated May 29, 1997, Dr. d'Oleire stated that complainant "is currently under my care. She is now able to work in an optimized environment. I recommend to start Ms. Gurrie on a half-time position, which will be evaluated after a month."

20. Following up on this letter, personnel manager Gary Martinelli spoke to Dr. d'Oleire and requested clarification on what she meant by an "optimized environment." In this conversation Dr. d'Oleire advised that she was not restricting complainant from returning to the Handgun Hotline unit, but said complainant could have a problem if "stressors" in that area had not been reduced. Mr. Martinelli requested clarification of what this meant.

21. In a June 2, 1997, letter to Mr. Martinelli, Dr. d'Oleire stated:

You asked me to clarify my statement "optimized work-environment." Ms. Gurrie has developed a mental illness that has recently improved under treatment, allowing her to return to a part-time position. In order to maintain her health status, it would be essential for Ms. Gurrie to work in an environment that has shown itself to be emotionally and mentally safe. She will further benefit from supervision by individuals with a demonstrated understanding and an ability to accommodate individuals with disabilities. Ms. Gurrie believes that these conditions were not fulfilled when she worked in her old position, prior to getting sick.

22. While respondent was willing to return complainant to the Handgun Hotline position on a part-time basis, Mr. Martinelli still was not sure after his conversation with Dr. d'Oliere what, if any, specific changes or accommodations were needed for complainant to work in that unit. Because of this, Mr. Martinelli arranged for an independent medical examination (IME) of complainant by a clinical psychologist, Dr. Eric Hummel.

23. A June 23, 1997, letter from Mr. Martinelli to Dr. Hummel included the following:

Summary of Current Situation

*Ms. Gurrie works for the Crime Information Bureau in the Handgun Hotline Unit. This Unit is responsible for taking calls from gun dealers to verify an individual's legal eligibility to purchase a handgun. Ms. Gurrie and other operators take calls from gun dealers, query a computer system to access individual's criminal history records, make determinations as to the individual's eligibility to purchase a handgun, and responds to the gun dealer with either an approval or denial decision. Her position involves some night and weekend work during which time no supervisor is on site (see attachment #1 for job description and list of essential job functions).

*Ms. Gurrie went out on sick leave effective 2-18-97. On 2-24-97, we received a note from her doctor (see attachment #2), Robert O. Burns, indicating that she was to be released from work for extreme mental stress due to a hostile work environment.

*Also on 2-24-97, we received a union grievance through Ms. Gurrie's union representative in which she alleges a variety of abuses by her supervisor and fellow employees and seeks, among other forms of relief, a transfer to a position in another unit. It was mutually agreed to wait on hearing this grievance until such time as Ms. Gurrie was medically able to participate in a discussion of these complaints—(See attachment #3). While Ms. Gurrie has indicated that she is prepared to discuss this grievance, it has not yet been heard due to the recent unavailability of her union representative. I understand that this grievance may be scheduled and heard within the next week.

*On 4-2-97, we approved Ms. Gurrie to be on a Family Medical Leave from 2-18-97 until 5-13-97 based on the information provided by her psychiatrist, Ms. Floriane d'Oleire. Since that time, Ms. Gurrie has been under the treatment of Dr. d'Oleire who was reevaluating her on a monthly basis. On 5-29-97 Dr. d'Oleire provided a statement that Ms. Gurrie was able to return to work in an "Optimized work environment" and recommended her initial return on a half-time basis with reevaluation after one month. The Department of Justice was prepared to accommodate Ms. Gurrie's return to her previous position on a half-time basis, but was informed by Ms. Gurrie and then by Dr. d'Oleire that she could not return to work within the same Unit. When I asked Dr. d'Oleire to better define "Optimized work environment" she provided me with the following: "it would be essential for Ms. Gurrie to work in an environment that has shown itself to be emotionally and mentally safe. She will

further benefit from supervision by individuals with a demonstrated understanding and an ability to accommodate individuals with disabilities. Ms. Gurrie believes that these conditions were not fulfilled when she worked in her old position, prior to getting sick” (see attachment #4). This information has not been helpful to us in determining what, if any, accommodations we can make in order to return Ms. Gurrie to her previous position.

*On 6-10-97, Ms. Gurrie also filed an appeal with the State Personnel Commission alleging discrimination on the basis of Family Medical Leave, Handicap, Harassment and other conditions of employment. In particular she has indicated that she believes that she needs to be transferred to a different position, but has been informed that there are currently no other vacancies for her to transfer to within the Department of Justice (see attachment #5).

What We Would Like You To Do

We do not believe that we have received sufficient information from Ms. Gurrie’s doctor to establish her ability to return to work or under what restrictions she could return to work. Therefore, we ask that you conduct an Independent Medical Examination in order to answer the following questions:

- 1) Is Megan Gurrie currently medically unable to perform work of any kind?
- 2) If she is medically able to work, is she unable to perform any one or more of the essential functions of her job (see attachment #1).
- 3) Can she now return to her previous job on a full-time basis? If not, can she return in a part-time capacity (please specify the number of hours a day/week may she be allowed to work)?
- 4) If she can return to her previous position, are there any specific work restrictions and/or accommodations which you would recommend?
- 5) If she is unable to return to her previous position at this time, can you provide an estimate of the probable duration of her continued absence?

- 6) Are there any circumstances relating to her medical condition which would permanently restrict her from returning to her previous position?

24. In a letter to Mr. Martinelli from Dr. Hummel dated August 1, 1997, he concluded that complainant "is psychologically unable to perform job duties similar or equal to her current position [Handgun Hotline] at this time," either on a full or part-time basis. His characterization of complainant's psychological situation includes the following:

There is evidence to indicate that Ms. Gurrie is experiencing psychological disruption related to both current symptoms as well as more long-term psychological traits . . . Ms. Gurrie is currently experiencing a mild to moderately depressed state which includes significant variation in mood, nervousness, tension, and a critical self-focus. . .

24. By the time of this letter (August 1, 1997), complainant had exhausted all her sick leave, family and medical act leave, and the leave without pay available to her under the union contract.

26. In August 1997, respondent offered complainant the currently available positions within the agency which were at the same or lower level pay range, and for which complainant was qualified.

27. Although complainant's union representative said that one of these positions (records check clerk) on a half-time basis would be suitable for complainant, neither complainant nor her representative ever returned the agreement involving appointing complainant to this position.

28. During complainant's leave of absence, and prior to this time (August 1997) the only PA 2 vacancy which had occurred in DOJ had been filled by the transfer of another PA 2 who had more seniority than complainant, and thus was contractually entitled to that vacancy.

29. During complainant's leave of absence, and prior to August 1997, when the aforesaid vacant positions were offered to complainant, respondent did not notify complainant of vacancies within DOJ, but did notify the union representing complainant of these vacancies.

30. In a September 15, 1997, letter to the Department of Employee Trust Funds (DETF), complainant submitted her resignation from state employment. This letter includes the following:

My union representative has informed me that I can be terminated for job abandonment, lose my employee trust fund account, and surrender my reinstatement rights if I don't resign from my state job.

The position I held was a Program Assistant II at the Handgun Hotline, Crime Information Bureau, Department of Justice. Due to stress from a hostile work environment, I have been on medical leave and receiving Income Continuation Insurance payments since February 18.

My doctor approved me to work in an optimal environment half-time in June, but the D.O.J. was unable to provide me with a transfer position, which was requested in my grievance.

The grievance I filed in February was finally addressed in August; in response to my request for a transfer, the D.O.J. offered me two full-time positions back at the C.I.B., and one half-time position in the record check unit.

At the same time, the D.O.J. responded to my complaint with over fifty pages of lies, half-truths, and personal attacks. This document succeeded in poisoning any chance I might have had at a positive, stable, or healthy return to work.

While still working on a response to the D.O.J.'s statements, I have accepted a Communication Assistant position with my former employer, Society's Assets. This is the company I was working at when I accepted the position at the Handgun Hotline. It is a safe, healthy working environment with clear work rules, professional supervision, and an anti-harassment policy.

At Mr. Duchrow's [union representative] recommendation, I am regretfully submitting my resignation from the Handgun Hotline. I believe other state jobs have healthy and respectful atmospheres and are led by competent, professional supervisory staff. I find it unfortunate that I wasn't given the opportunity to see such an environment during my two and one half years at the Handgun Hotline.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these cases pursuant to §§111.375(2) and 230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish by a preponderance of the evidence that at all relevant times she has been an “individual with a disability” pursuant to §111.32(8), Stats.

3. Complainant has sustained her burden of proof on this question to the extent she has established that she has been an individual with a disability of mental illness (depression).

4. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent discriminated against complainant by failing to provide an accommodation for her disability when her work location was changed on or about January 2, 1997.

5. Complainant did not sustain her burden of proof on this question, and it is concluded that respondent did not discriminate against complainant by failing to provide an accommodation for her disability when her work location was changed on or about January 2, 1997.

6. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent discriminated against her by failing to accommodate her disability when she was not informed of a transfer opportunity while she was on leave.

7. Complainant has not sustained her burden of proof on this issue, and it is concluded that respondent did not discriminate against her by failing to accommodate her disability when she was not informed of a transfer opportunity while she was on leave.

8. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent discriminated against her on the basis of disability in connection with her alleged constructive discharge.

9. Complainant has not sustained her burden of proof on this question, and it is concluded that she was not constructively discharged and that respondent did not discriminate against her on the basis of disability in connection with her resignation from employment with respondent.

OPINION

At the outset of this opinion, it should be emphasized that the Commission's role in these cases is confined to the issues for hearing. It is clear on this record that (to say the least) a poor relationship existed for an extended period between complainant and her supervisor and some of her coworkers. While this relationship provides much of the context for the issues for hearing, it is not the Commission's role, nor does it undertake, to try to determine who was to blame, or more at fault, with respect to those relationships. The Commission addresses only the narrower questions of whether respondent violated the WFEA with respect to the following issues for hearing:

97-0083-PC-ER

Whether respondent discriminated against complainant by failing to accommodate her disability when her work location was changed on January 2, 1997, and when she was not informed of a transfer opportunity while she was on leave.

98-0130-PC-ER

Whether respondent discriminated against complainant on the basis of disability . . . in connection with her alleged constructive discharge. (Conference Report dated September 4, 1998)

The initial determination in Case No. 97-0083-PC-ER found there was no probable cause to believe complainant was discriminated against on the basis of disability in regard to alleged harassment by complainant's coworkers and Ms. Westra. Complainant did not appeal this finding. Thus that issue, which would have been likely to involve a broader review of complainant's problems with her coworkers and her immediate supervisor, is not before the Commission. *See* §PC 2.07, Wis. Adm. Code.

Turning to the merits, the first question (common to both cases) is whether complainant was an "individual with a disability" as set forth in §111.32(8)(a), Stats.:

- “Individual with a disability” 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 such impairment; or
 - (c) Is perceived as having such an impairment.

See e.g., Conley v. DHSS, 84-0067-PC-ER, 6/19/87.

In brief, the medical evidence of record clearly establishes that complainant was clinically depressed, that this substantially affected her capacity to work and made achievement unusually difficult, and she was an “individual with a disability.” While complainant also referred to neurological injuries resulting from an automobile accident, there was no real medical evidence in this record to establish this condition. Complainant submitted in evidence a letter from a DVR (Division of Vocational Rehabilitation) counselor which confirmed that in 1991, complainant had been found to have been an eligible disabled person because of “permanent functional limitations resulting from an automobile accident.” The Commission has held that:

Complainant argues in regard to the definition of “handicap” that the fact that the DVR determined that complainant was handicapped leads necessarily to the conclusion that complainant was handicapped for purposes of the FEA. However, not only is the definition of “handicap” applicable to such determinations by DVR not identical to the definition of “handicap” in the FEA, but DVR’s administrative application of such term is not binding on the Commission. *Jacobus v. UW-Madison, 88-0159-PC-ER, 3/12/92, p. 12.*

That decision is also in keeping with the fact that complainant’s neurological status involves a medical condition, and must be established by medical evidence—i. e., evidence provided by a physician.¹ *See Connecticut Life Insurance Co. v. DILHR, 86 Wis. 2d 393, 407, 273 N. W. 2d 206 (1979).*

¹ This is not meant to imply that the only way to establish a disability is through actual physician’s testimony. Under some circumstances, medical records signed by a physician would suffice, as was the case with complainant’s depression, which was established as a disability through such evidence.

Another factor that is inconsistent with a conclusion that complainant's neurological condition constitutes a disability is that it is not mentioned by the two doctors whose opinions concerning complainant's ability to work has been relied on by complainant as the basis for her accommodation claims. They did find a causal link between complainant's depression and her inability to work. If complainant's neurological condition had been a cause of her inability to work, it can be assumed that the doctors would have mentioned it. Therefore, while complainant did not establish on this record a disability related to her neurological condition, she did establish that she was an individual with a disability with regard to her depression, and so the Commission will continue to address the other elements of her claims.

The next question is whether respondent discriminated against complainant by failing to accommodate her disability when her work location was changed to a desk adjacent to co-worker Sandy. In addition to establishing that she is an individual with a disability, complainant must show that having a desk location at some distance from Sandy's desk was an accommodation for her disability. She also must establish that she requested being seated at a distance from Sandy as a reasonable accommodation for her mental illness, or that respondent's managers otherwise were aware, or should have been aware as reasonable managers, that keeping complainant's desk at some distance from Sandy's desk was a reasonable accommodation for her disability of mental illness.²

Initially, it has to be observed that respondent made an effort to satisfy complainant's concerns about her desk location. Ms. Westra told complainant that she could switch desks with a co-worker or move her desk location inside the hotline room. Complainant declined both options. While Ms. Westra did not make these offers as an

² An employer may have a duty of accommodation even if the employe has not requested an accommodation. In some cases, the employer should infer from the circumstances that an accommodation must be explored. *See Betlach-Odegard v. UW-Madison*, 86-0114-PC-ER, 12/17/90 (although applicant for food service position did not state she had a disability or that she needed an accommodation, after she stated that she could not read menu cards the employer had an obligation at that point to explore possible accommodations for what was an obvious disability).

attempt to accommodate complainant's disability, they had the effect of alleviating the problem complainant perceived with being seated next to Sandy. That complainant did not want to pursue these options for whatever reasons³ does not affect this conclusion. Assuming that the desk arrangement involved an accommodation, an employer is not required to provide the exact accommodation preferred by the employee. *See Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87.

The Commission also concludes that complainant did not establish on this record that keeping her desk at some distance from Sandy's desk was an accommodation for her handicap (depression). Complainant relied on statements from two doctors to support her claim. The first document completed by Dr. d'Oleire states that complainant had a "major depressive disorder" whose course could not be predicted, and she was not able to perform work of any kind." (Finding #15) A February 20, 1997, note signed by Dr. Bruns states that complainant "is suffering extreme mental stress due to a hostile work environment, and will not be able to return to work until proper treatment is accomplished." (Finding #16) In a subsequent letter dated June 2, 1997, Dr. d'Oleire states:

You asked me to clarify my statement [in a previous letter]"[complainant is able to work in an] optimized work-environment." Ms. Gurrie has developed a mental illness that has recently improved under treatment, allowing her to return to a part-time position. In order to maintain her health status, it would be essential for Ms. Gurrie to work in an environment that has shown itself to be emotionally and mentally safe. She will further benefit from supervision by individuals with a demonstrated understanding and an ability to accommodate individuals with disabilities. Ms. Gurrie believes that these conditions were not fulfilled when she worked in her old position, prior to getting sick. (Finding #21)

³ Complainant at the time explained her decision not to switch desks with Cindy as follows:

Having talked to Cindy about this when Mary first brought the idea up for discussion, I knew Cindy wasn't thrilled with the idea. Since Mary had already decided to put me where I was, I didn't want to make this into a bigger production by asking Cindy to switch and moving more desks around once she got to work. Already being upset, I didn't wish to further aggravate the situation. (Complainant's Exhibit 1)

None of these doctors' opinions address any specific accommodations for complainant's disability. The only one that deals at all with the issue of accommodation is the June 2, 1997, letter from Dr. d'Oleire. This letter is very general—an emotionally and mentally safe environment is needed, etc.—and it does not specifically address any specific aspect of the office environment, such as the location of the desks. Furthermore, the opinion of Dr. Hummell (clinical psychologist) is inconsistent with the notion that complainant's inability to work could be accommodated by any accommodations of the nature that complainant contends should have been provided:

There is evidence to indicate that Ms. Gurrie is experiencing psychological disruption related to both current symptoms as well as more long-term psychological traits. . . .

Ms. Gurrie's more long term traits which are problematic include a significant distrust, emotional distancing, and sense of estrangement from most people. She is an individual who is resentful, angry, and irritable. Others will tend to experience Ms. Gurrie as unpredictable, changeable, and difficult to understand. When upset, Ms. Gurrie may project or rationalize her own behavior to other people and circumstances with little appreciation for how her actions contribute to problems. . . . (letter of August 1, 1997, Respondent's Exhibit 137)

This opinion is inconsistent with the contention that a change in the office seating plan would have constituted an accommodation of complainant's disability. When combined with the other evidence of record, the Commission concludes that complainant did not sustain her burden of proof on this issue.

The Commission also finds that complainant did not inform management specifically that she had a disability and that having a desk away from Sandy was an accommodation for that disability. As discussed above, the only disability complainant established was the mental illness of depression. This mental illness was not first brought to management's attention until March 24, 1997, when it received Dr. d'Oleire's certification in support of complainant's request for a medical leave of absence which had begun on February 18, 1997. As discussed above in connection with the conclusion that complainant did not establish that the office seating arrangement was

an accommodation for her depression, her doctors never addressed this point in their written statements made available to respondent

Again laying to one side the problems of proof in complainant's case that have already been discussed, the Commission would not conclude that respondent should have inferred from the circumstances that complainant had a disability (mental illness) for which her desk location would have been an accommodation. On one hand there is evidence that would support the proposition that respondent should have drawn this inference. Ms. Westra knew that complainant and Sandy did not get along. Complainant had stated at least once (see Finding # 5) that the "hostile work environment" complainant perceived (which included her poor relationship with Sandy) had caused anxiety and depression. Complainant had opposed the move prior to its implementation, at least partly because of the arrangement of work stations that would result. However, as Finding # 5 illustrates, complainant had numerous complaints about Sandy, as well as other co-workers, and this friction had extended over a long period of time. Some of these complaints ran to issues that were not personal to complainant—e. g., "Lack of professional demeanor with gun dealers." At the time the work stations were rearranged, complainant had neither identified herself to Ms. Westra as disabled nor submitted any medical documentation that would support the existence of a disability. The situation Ms. Westra was dealing with in the office was relatively diffuse, involving multiple individuals and multiple sources of conflict. The Commission can not say, without the benefit of hindsight, that a reasonable supervisor would have concluded in the context of the dissension in the office and complainant's role in it, that complainant had a disability of mental illness (depression) and that keeping her work station at some distance from Sandy's was an accommodation of that disability.

With regard to the question of whether respondent failed to accommodate complainant's disability by failing to inform her of a transfer opportunity while she was on leave, the only transfer opportunity of which complainant was not advised was filled by a coworker who had more seniority than complainant, and thus was entitled contractually to the transfer. While an employer may be required to provide a transfer as an ac-

accommodation, *see McMullen v. LIRC*, 148 Wis. 2d 270, 434 N. W. 2d 830 (Ct. App. 1988), *McMullen* does not require an employer to violate a collective bargaining agreement to do so.

The next question is whether respondent discriminated against complainant on the basis of disability in connection with her alleged constructive discharge. A constructive discharge must be established by an objective standard—i.e., the test is whether a reasonable person similarly situated to complainant would have experienced the conditions of employment in question as so opprobrious as to compel the employee to resign. *See Iheukumere v. UW-Madison*, 90-0185-PC-ER, 2/3/94.


In this case, complainant commenced a leave of absence on February 18, 1997. She was never present at work after that, and she resigned on September 15, 1997. She filed her complaint with this Commission on July 10, 1998. Thus the WFEA 300 day actionable period, *see* §111.39(1), Stats., commenced on September 13, 1997. This was two days before complainant submitted her resignation. Since respondent had a continuing duty to provide complainant with an accommodation after she went on leave, this complaint is timely, but only with respect to the alleged failure of accommodation after complainant went on leave of absence. As discussed above, during this period the respondent did not have an available position to which complainant could have transferred that would have constituted an accommodation. Since respondent did not violate its duty of accommodation to complainant, but in fact continued her in the status of an employee by extending her leave of absence beyond what it was required to do contractually, it can not be said that respondent created intolerable conditions which forced complainant to have resigned.

ORDER

The Commission having concluded that respondent did not discriminate against complainant in violation of the WFEA, these complaints are dismissed.

Dated: August 25, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rjb:970083Cdec1.2


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.)

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