

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JEANNINE CHILDS**

*Complainant,*

v.

**Chancellor, UNIVERSITY of WISCONSIN-  
MADISON**

*Respondent.*

FINAL  
DECISION AND  
ORDER

Case No. 00-0008-PC-ER

This matter is before the Commission as an appeal from an investigator's initial determination of no probable cause with regard to the decision to terminate appellant's employment with University of Wisconsin-Madison, University Health Services (UHS), as an LTE (limited term employe), and other allegations of harassment and failure to hire. The parties agreed to the following statement of issues for hearing.

1. Whether there is probable cause to believe that respondent discriminated against complainant based on age, race/color or disability when her limited term employment was terminated January 10, 2000.

2. Whether there is probable cause to believe that respondent harassed complainant because of her age, race/color or disability between September 1999, and January 2000, in regard to the following, allegations:

- a. Ms. Czyszak-Lyne "stalked" complainant at work.
- b. Ms. Czyszak-Lyne reported false complaints about complainant's work.
- c. Ms. Czyszak-Lyne treated complainant in a degrading and disrespectful manner.
- d. Ms. Zweifel failed to treat complainant professionally.
- e. Ms. Zweifel failed to properly support complainant when complainant when complainant complained.
- f. Complainant was told to turn down her radio. Complainant was told to do courier work.

g. Complainant's lack of a regular schedule.

3. Whether there is probable cause to believe that respondent discriminated against complainant because of her age, race/color or disability with regard to denial of employment in a permanent Program Assistant 2 vacancy on the 3<sup>rd</sup> floor in December of 1999. *Conference Report*, 12/3/01

#### FINDINGS OF FACT

1. Complainant is African American and Native American with a date of birth of January 28, 1939.

2. During complainant's employment with the UHS, she was the only African American program assistant in the medical records and reception area.

3. Complainant missed very little time (a few hours, possibly equaling a day) during her employment with respondent, and sometimes requested additional overtime during the course of her employment.

4. Complainant had previously worked for respondent in medical records, under the direction of Sheila Zweifel. She terminated her employment in September 6, 1996.

5. Complainant later worked for respondent at the Wingra Health Clinic in reception as a permanent employee, but she was terminated sometime during 1999. Ms. Czyszak-Lyne had been assigned as complainant's union representative at the time of complainant's termination from Wingra Health Clinic in 1999. Complainant felt that Ms. Czyszak-Lyne had not represented her properly, and as a result she had lost her respect for Ms. Czyszak-Lyne.

6. Complainant was hired in August 1999 by Ms. Zweifel, Manager of Medical and Reception Services, as a Limited Term Employment (LTE) Program Assistant 2, with a work location of 1552 University Avenue.

7. The LTE Program Assistant 2 position was a split position between medical reception and medical records.

8. Complainant held the LTE Program Assistant 2 position until she was terminated on January 10, 2000.

9. In mid-1999, a reorganization took place at Health Services that resulted in the satellite clinic's records being maintained at the main location, which required increased management responsibilities for Ms. Zweifel.

10. In a memo dated June 22, 1999, Ms. Zweifel notified Program Assistant 2 Mary Czyszczak-Lyne that respondent was going to begin developing her as a lead worker, and that her work location was going to be changed to the Medical Record File Room at respondent's 1552 University Avenue location. As a lead worker, the duties and responsibilities delegated to Ms. Czyszczak-Lyne would include training staff on medical chart preparation and review, and providing general assistance to both medical file room locations.

11. On September 24, 1999, complainant and Ms. Zweifel met to discuss work related issues, including error rates in the medical charts and the need for additional training.

12. On September 27, 1999, Ms. Zweifel sent an e-mail to Ms. Czyszczak-Lyne regarding matters that needed to be discussed including inter-personal communication, time sheets, chart prepping issues, etc.

13. On September 28, 1999, Ms. Zweifel and Ms. Czyszczak-Lyne met to discuss several issues, including inter-personal communications between complainant and Ms. Czyszczak-Lyne.

14. On September 30, 1999, complainant, Ms. Zweifel and Ms. Czyszczak-Lyne met to discuss communication issues between complainant and Czyszczak-Lyne.

15. In the first part of October, 1999, Ms. Zweifel arranged to have complainant receive additional training in the satellite office by Linda Bridwell, an employee of the respondent.

16. On October 20, 1999, a team meeting was held to discuss additional training for all medical file room employees. Ms. Czyszczak-Lyne was assigned the responsibility for providing such training.

17. On October 22, 1999, complainant filed an internal complaint with respondent's Equity and Diversity Resource Center (EDRC), alleging she was being harassed by Ms. Czyszak-Lyne because of her age. Complainant inferred in her complaint narrative that she was blamed for mistakes because of her race/color and age. In addition, she alleged that Ms. Czyszak-Lyne was abusing her union position in an attempt to get the complainant fired. The EDRC investigator notified complainant by letter that the preliminary determination concluded there was no credible evidence of unlawful discrimination or harassment based on the interview with complainant. The EDRC did not process complainant's internal charge further.

18. From October 26-29, 1999, medical record staff, including the complainant, received additional training from Ms. Czyszak-Lyne. During this time period, Ms. Zweifel met with Ferdinand Schlapper, Director of Administrative Services, and two supervisors regarding several issues, including training, error rate, staffing, and continued conflicts between complainant and Ms. Czyszak-Lyne. A decision was made to temporarily relocate the complainant to the position of medical reception.

19. On November 1, 1999, Ms. Zweifel notified complainant by letter that she was being reassigned to receptionist training because her job consisted of a split appointment, and because of complainant's continued performance problems in medical records

20. On November 1, 1999, complainant provided a written response to the reassignment letter, countering the statements in the memo from Ms. Zweifel. In December 1999, complainant applied for an open Program Assistant 2 position in respondent's Women's Health and Dermatology Clinic. Based on respondent's hiring practices and procedures, and in accordance with the labor contract, an employee with contractual transfer rights was selected for the position. Complainant did not have contractual transfer rights as an LTE employee, though she did have reinstatement rights based on her permanent employment with Wingra Clinic, in 1999. Based on respondent's policy and procedures, and the collective bargaining contract, respondent had no choice but to give the job to an employee with contractual transfer rights.

21. In a letter dated December 6, 1999, complainant was informed that she was ineligible for the Program Assistant 2 position in question. In addition, the letter provided names and telephone numbers of individuals complainant could contact regarding reinstatement information.

22. On December 29, 1999, a supervisor sent an e-mail to all medical records and medical reception staff, indicating a need for assistance because of staff shortages. Specifically, the medical records room was short by two staff members. Sometime between December 29, 1999 and January 3, 2000, Ms. Zweifel informed complainant that she was reassigned back to medical records due to a staff shortage.

23. On January 4, 2000, Ms. Zweifel and Ms. Czyszak-Lyne told medical record employees to turn down or turn off loud radios.

24. A student employee involved in an independent project was allowed to wear head-phones, with the volume turned down, because she did not have to interact with other employees.

25. On January 5, 2000, complainant provided Ms. Zweifel with a letter she had written. The letter contained information regarding complainant's medical condition, which included chronic asthma and rotator cuff tendonitis. In addition, the letter stated the complainant was experiencing physical health problems when she worked near Ms. Czyszak-Lyne.

26. On January 7, 2000, complainant made a request to Ms. Zweifel to work on the third floor. The request was denied.

27. On January 7, 2000, Ms. Zweifel met with Mr. Schlapper, and a decision to terminate complainant was made.

28. On January 10, 2000, Ms. Zweifel informed complainant by letter and in person that she was being terminated from her employment with respondent. The letter provided a list of reasons to the complainant, including continued problems accepting direction from her supervisor and lead worker, discourteous behavior with others, and the determination she had made false and malicious statements about others.

### CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to sec. 230.45(1)(b) Stats.

2. Complainant is eligible for protection under her WFEA by virtue of her age and race/color.

3. Complainant has not shown she is eligible for protection under the WFEA by virtue of being a person with a disability.

4. Complainant has the burden of proof to establish that there is probable cause to believe respondent harassed her based on age and/or race/color or disability between September 1999 and January 2000, in regard to the allegations as listed in the statement of issue 2 (a-i).

5. Complainant did not satisfy her burden of proof to establish that there is probable cause to believe respondent harassed her based on age, race/color and/or disability as alleged in the statement of issue 2 (a-i).

6. Complainant has the burden of proof to establish that there is probable cause to believe respondent discriminated against her based on age, race/color and/or disability when her limited term employment was terminated on January 10, 2000.

7. Complainant has not satisfied her burden of proof. There is no probable cause to believe respondent discriminated against complainant when complainant's limited term employment was terminated on January 10, 2000.

8. Complainant has the burden of proof to establish that there is probable cause to believe respondent discriminated against her based on age, race/color and/or disability with regard to the denial of employment in a permanent position as Program Assistant 2 when a vacancy became available on the 3<sup>rd</sup> floor at respondent's location, in December of 1999.

9. The complainant has not satisfied her burden of proof. There is no probable cause to believe respondent discriminated against complainant when respondent

denied employment to complainant when respondent denied employment to complainant in a permanent Program Assistant 2 position in December of 1999.<sup>1</sup>

#### OPINION

This is a probable cause determination. “Probable cause” is defined as “a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. Sec. PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits. *Boldt v. LIRC*, 173 Wis. 2d 469, 496 N.W. 2d 676 (Ct. App. 1992) The Court stated that the concept of probable cause focuses on probabilities, not possibilities.

[The rule] adopts the viewpoint of a prudent, rather than a speculative, imaginative, or partisan person. As such, it contemplates ordinary, everyday concepts of cause and effect upon which reasonable persons act. It is [the adjudicative agency’s] duty to consider the facts of each case and determine whether they meet this fluid concept. *Id.* At 475-76.

In a probable cause proceeding, the Commission is to weigh all the evidence, and to consider the credibility of the witnesses, in making its determination. *Winters v. DOT*, 84-0003-PC-ER, 9/4/86; citing *McLester v. Personnel Commission*, 84-1715 (Ct. App. 1985) (unpublished). The Commission “is not limited to merely examining whether the petitioner has presented evidence which, if believed, would be sufficient to support his claim.” *Winters* at 16.

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), provides the analytical framework for discrimination cases, under the Wisconsin Fair Employment Act (FEA). The initial burden is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the action taken, which the complainant, in turn, may attempt to show was a pretext for discrimination. *Id.*, *Texas*

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<sup>1</sup> This conclusion was added because it had inadvertently been left off the proposed decision.

*Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 1010 S. Ct. 1089, 25 FEP Cases (1981).

Complainant may establish a prima facie case of discrimination in a termination case by showing that: (1) she is a member of a group protected under the FEA, (2) she was discharged, (3) she was qualified for the job, and (4) either she was replaced by someone not within the protected class or others not in the protected class were treated more favorably. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 173, 376 N.W. 2d 372 (Ct. App. 1985); followed in *Harrison v. LIRC*, 211 Wis. 2d 681, 565 N.W. 2d 572 (Ct. App. 1997) and in *Eleby v. LIRC*, 223 Wis. 2d 802, 589 N.W. 2d 456 (Ct. App. 1998).

Complainant contends that she is a member of a group protected by the Wisconsin Fair Employment Act (WFEA) because of her race/color, age, and disability. The Commission finds that complainant is a member of a group protected by the WFEA with respect to race/color, and age, but she did not establish she is an individual with a disability.

The WFEA defines an "individual with a disability" in Sec.111.32(8), Wis. Stats., as follows:

(8)"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.

In her letter dated January 5, 2002, complainant stated that she had chronic asthma, which caused her to be very sensitive to environmental pollutants such as certain cleaning compounds and dust. In addition, complainant stated that she suffered from rotator cuff tendonitis with early osteolysis. Because of her asserted medical conditions, complainant maintained that she took the job in medical records against her doctor's orders. Ms. Zweifel, complainant's manager, testified that the January 5, 2002, letter was the first time she was notified by complainant that she suffered from any medical condition. In fact, Ms. Zweifel testified that complainant had a very con-



sistent work history, that she had missed very little time, and that she had often requested overtime. Complainant did not offer either testimony or a written explanation from her doctor, nor did she provide any other written documentation regarding her medical condition. In addition, complainant had not requested any accommodations from her employer prior to the January 5, 2000 letter. Complainant can not establish probable cause to believe she was disabled from conditions like palpitations, stress, and asthma without providing an expert medical opinion from a health care provider.

Complainant establishes the second element, because she was terminated from her limited term employment (LTE) Program Assistant 2 position with respondent on January 10, 2000.

Arguably, complainant established the third element because respondent believed she was qualified for the LTE Program Assistant 2 position. Complainant was rehired by her previous manager, Sheila Zweifel, who knew complainant and was aware of her prior employment history.

With respect to the fourth element, no testimony was given regarding the replacement hired for the complainant's position. But based on the allegations and testimony provided during the hearing, complainant believed that she was being singled out and harassed by Ms. Czyszak-Lyne, who, as a lead worker, did have some designated supervisory responsibilities over the complainant.

Ms. Zweifel testified that complainant came to her and complained about her treatment by Ms. Czyszak-Lyne. Ms. Zweifel testified that she met with complainant and with Ms. Czyszak-Lyne regarding what she termed as "inter-personal communication" issues. Complainant also alleged that she was treated differently when she was told to turn her radio off, while another employee was allowed to listen to headphones. With fungible type jobs, such as most lower-level LTE positions, less emphasis is placed on the fourth element as long as there is some evidence of pre-text.

Where the case has been tried fully, it is unnecessary to analyze whether a prima facie case has been established,<sup>2</sup> and the Commission should go ahead and address the question of pretext. See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed 403, 1983 U.S. LEXIS 141 (1983). Therefore, the Commission finds complainant meets the requirements for the fourth element, thereby establishing the elements for a prima facie case for discrimination, except as to her disability claim.<sup>3</sup>

Respondent satisfied its burden of articulating a non-discriminatory rationale for its decision to terminate complainant's employment. In a letter dated January 10, 2000, the respondent explained the complainant was being terminated from her position as an LTE Program Assistant 2 for the University Health Services because: 1) she continued to have problems in following directions from her manager, supervisor or lead worker; 2) there were documented violations of UW Classified Work Rules, including section IV, subsection D, "making false or malicious statements concerning other employees, supervisors, or students" and section IV J, which states "failure to exercise good judgment or being discourteous, in dealing with fellow employees, student or the general public." During the hearing, Ms. Zweifel testified that complainant was terminated for continuing performance problems as well.

With regard to the continued problems in following directions from a manager, supervisor, or lead worker, complainant attempted to establish pretext by maintaining respondent required her to work with Ms. Czyszak-Lyne and allowed Ms. Czyszak-Lyne to train complainant, after she had told Ms. Zweifel that she felt Ms. Czyszak-Lyne harassed her, blamed her for mistakes that were not hers, "stalked" her and abused her authority. The Commission concludes there is no evidence of pretext in the

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<sup>2</sup> An exception to this approach is where there is a missing element of a prima facie case which is also an essential element for establishing liability. For example, if a person has not established that he is at least 40 years old and thus covered by the WFEA age discrimination provision §111.33(1), Stats., it is not possible for that person to establish an age discrimination claim even if the employer's proffered reason for its action were pretextual, and there normally would be no rationale for analyzing the question of pretext.

present case. In response to complainant's allegations, Ms. Zweifel met with Ms. Czyszak-Lyne on September 28, 1999, to discuss several topics, including the interpersonal communications issues between complainant and Ms. Czyszak-Lyne. On September 30, 1999, complainant, Ms. Zweifel, and Ms. Czyszak-Lyne met to discuss these issues and the communication issues between complainant and Ms. Czyszak-Lyne. Ms. Zweifel testified that she tried alternative working accommodations for complainant to remedy the conflict between complainant and Ms. Czyszak-Lyne. Ms. Zweifel determined that because of complainant's need for additional training, cross-coverage issues, and the desire to remove complainant from continuous daily contact with Ms. Czyszak-Lyne, complainant was moved temporarily to a satellite office in the first part of October. Complainant received training from another employee, Ms. Linda Bridwell. Though complainant eventually moved back to the main file room location (1552 University Ave), problems continued to occur between complainant and Ms. Czyszak-Lyne. Ms. Zweifel met with Mr. Ferdinand Schlapper and two other supervisors and the decision was made to move complainant to medical reception on a temporary basis. A letter was provided to complainant stating that she was being transferred to medical reception for reasons including interpersonal communications and a high rate of errors.

In a letter dated November 1, 1999, complainant reiterated her problems with Ms. Czyszak-Lyne.<sup>4</sup> In addition, in a letter dated January 5, 2000, complainant de-

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<sup>3</sup> The last clause was added to the language found in the proposed decision to reflect the conclusion that complainant had failed to establish a prima facie case as to her disability claim.

<sup>4</sup> The initial clause in this sentence was added to the language of the proposed decision in order to clarify the date of the letter. The remaining portion of this footnote was in the proposed decision. A sentence in paragraph 3 states: "I want to make it clear that I cannot work with her!" (R. Exh. 11) Complainant then goes on to explain her history with Ms. Czyszak-Lyne, which included Ms. Czyszak-Lyne in the role as union representative for complainant during her previous employment with Wingra Family Medical Center in 1998. Complainant was very dissatisfied with Ms. Czyszak-Lyne's handling of complainant's termination. In paragraph 8, complainant states:

"I can not take order (sic) from Mary C-L. She was both my union rep and my co-worker which is to me an apparent conflict. I feel because she failed in her capacity as my union representative that I cannot trust her as a team leader. She almost pushed me to the verge of insanity and possible bodily harm! I be-

tailed her dissatisfaction with several parts of her employment, including the fact that she did not have a set work schedule and that she had no idea where or when she was supposed to work. In addition, complainant alleged Ms. Zweifel knowingly put her health at risk by making complainant work with Ms. Czyszak-Lyne, that she (complainant) felt she didn't receive moral support from Ms. Zweifel or Mr Schlapper, and that complainant wasn't receiving reasonable accommodations.

During her testimony, Ms. Zweifel took issue with many of the statements written in both the November 1, 1999, and January 5, 2000, letters. Ms. Zweifel testified that complainant was hired to work a split-shift LTE position between medical records and medical receptions. In addition, she testified schedules were provided a week in advance and complainant was aware of where she was to work. Changes made in complainant's work location had to do with filling staff shortages, and when possible, providing complainant an opportunity to work away from direct contact with Ms. Czyszak-Lyne, which included training opportunities at the 905 satellite facility. In addition, Ms. Zweifel stated that she was never observed or was made aware of any health conditions complainant had with respect to chronic asthma, heart palpitations etc. Zweifel testified complainant never provided any medical documentation nor did complainant ever verbally express her medical condition to Ms. Zweifel. There is no evidence in the record that complainant submitted medical documentation or any written documentation regarding her health condition or medical disabilities prior to the January 5, 2000, letter from complainant which contained her own conclusory characterization of her health condition.

Finally, Ms. Zweifel testified that she was supportive when complainant expressed her difficulties with Ms. Czyszak-Lyne. Ms. Zweifel met with complainant and Ms. Czyszak-Lyne alone as well as together, she moved complainant to different locations for work when it was possible and she provided complainant with several op-

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lieve that the accusations brought against me should have been thoroughly investigated before the letter of reprimand was written. This is an insult to my character, integrity, and work ethic.

portunities for additional training for prepping of medical records, which was a key responsibility when working in medical records.

The evidence shows that Ms. Zweifel was proactive in trying to create an improved working atmosphere between complainant and Ms. Czyszak-Lyne. Ms. Zweifel was involved with her staff, consulted with her supervisors regarding the ongoing difficulties involving complainant, provided alternative work locations for complainant when staffing allowed, and offered additional training opportunities for complainant. In addition, complainant testified that she worked well with Ms. Zweifel.

Ms. Zweifel testified that complainant's continued refusal to work with Ms. Czyszak-Lyne, a lead worker who had supervisory type responsibilities, and the statements made throughout complainant's letters were the reason for complainant's termination. There is no evidence of pretext in the decision to terminate complainant's employment with University Health Services on January 10, 2000.

The Commission finds that while it is evident that complainant believed Ms. Czyszak-Lyne targeted her for heightened scrutiny, there is no evidence in the record to support a conclusion that there is probable cause to believe that respondent was motivated by complainant's race/color and/or age to terminate her employment as an LTE. Respondent provided legitimate reasons for being displeased with complainant's performance, and the complainant did not show these were pre-textual.

The complainant next alleges nine acts of harassment based on her age, race/color or disability. Because of the Commission's prior analysis and final determination that complainant did not meet the requirements of "an individual with a disability," we will look at the alleged harassment allegations based on age and/or race/color. The first question in regard to any such allegation is whether the subject's action qualifies as harassment. Section 111.36(1)(br) Wis. States., that "employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing agency or other person"

Engaging in harassment that consists of unwelcome verbal or physical conduct directed at another individual because of that individual's gender, other than the conduct described in par.(b), and that the purposed or

effect of creating an intimidating, hostile or offensive work environment or has the purpose or effect of substantially interfering with that individual's work performance. Under this paragraph, substantial interference with an employee's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

In *Harris v. Forklift Sys.*, 510 U.S. 17 (1993), the Court held that when determining whether an environment is hostile or abusive, all circumstances must be considered, and these may include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance. *See, also, Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Kannenberg v. LIRC*, 213 Wis. 2d 373 (Ct. App. 1997); *Zabcowicz v. West Bend*, 589 F. Supp 780 (W.D. Wis. 1984), and *Baskerville v. Culligan International Company*, 67 FEP Cases 564 (7<sup>th</sup> Cir. 1995).

The analysis for age or racial harassment is similar to that of sexual harassment. To establish racial harassment (i.e. that an abusive working environment was created for complainant as a result of racial harassment by respondent) the complainant must show that 1) the incidents of discriminatory harassment were sustained (i.e., numerous and pervasive) and non-trivial (i.e. opprobrious or severe) and 2) respondent failed to take reasonable steps to redress the injury resulting from the harassment or to prevent further harassment. *Laber v. UW-Milwaukee*, Case No. 81-PC-ER-143 (11/28/84) p. 17, *Yarbrough v. DILHR*, Case No. 88-0103-PC (2/22/90), pp. 16 and 18. In *North v. Madison Area Association for Retarded Citizens*, 844 F. 2d 401, 46 FEP 943 (7<sup>th</sup> Cir., 1988), the Court held that "for racial harassment to be actionable, it must be so severe and pervasive as to alter the conditions of employment and create an abusive working environment.

First, complainant alleges Ms. Czyszczak-Lyne "stalked" complainant at work. During complainant's testimony, she stated that Ms. Czyszczak-Lyne was "on her from

day one.” In addition, complainant stated Ms. Czyszak-Lyne followed her around the file room as well as her other temporary locations at the 905 satellite file room and on the 3<sup>rd</sup> floor of Health Services, during complainant’s work as a receptionist. Ms. Zweifel testified that Ms. Czyszak-Lyne had legitimate reasons to oversee some of the activities of complainant because of her status as “leadworker.” In addition, Ms. Czyszak-Lyne oftentimes was directed to take on responsibilities, such as training, that required her to visit the 905 satellite file room and the third floor. On its face, this incident is racially neutral as well as age neutral. There is no evidence in the record to show the above incidents were motivated by race/color or age or that the alleged incidents would rise to the level of severity required to sustain a conclusion that there is probable cause to believe respondent engaged in racial harassment or harassment on the basis of age.

Second, complainant alleges Ms. Czyszak-Lyne reported false complaints about complainant’s work. The complainant testified that she had her own system of initialing the charts, known only by some of the nursing staff, so that she could independently check to see if the medical charts she was prepping had errors. The complainant testified that nursing staff told her that her charts were done correctly. Ms. Zweifel testified that she received calls of complaints about the high error rates in the charts complainant had prepped. “Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by circumstances.” Sec. PC 5.03(5), Wis. Adm. Code. Both complainant and respondent offered hearsay evidence to support their position on the allegation of false reporting. Complainant and Ms. Zweifel testified credibly. This testimony is not being used as evidence to the extent that it goes to establish whether complainant was right or wrong. Instead, it does establish that respondent had reports indicating complainant’s error rate, and had a reasonable basis for its concern about complainant’s performance. Respondent provided additional testimony to support their position that errors were not falsely reported in the charts complainant prepared. As lead worker, Ms. Czyszak-Lyne was responsible

for reviewing medical chart preparation. Ms. Zweifel testified that she performed independent audits and found that complainant's charts had a high number of errors. Ms. Zweifel implemented new training initiatives to provide assistance to all medical prep staff. Both parties testified that they received different reviews from outside of the medical records staff. The evidence of record does not show that false complaints regarding error rates were made against complainant, or that the independent audits of complainants work were motivated by race/color or age.

Third, complainant alleges Ms. Czyszak-Lyne treated complainant in a degrading and disrespectful manner. Complainant testified that Ms. Czyszak-Lyne was disrespectful in the way that she treated complainant and made her feel stupid. In the letter date November 1, 1999, complainant stated that Ms. Czyszak-Lyne humiliated, disrespected, and degraded her, and made her feel like a maggot and mentally incompetent. In the letter dated January 5, 2000, complainant stated that Ms. Czyszak-Lyne made her feel like an insect. Ms. Zweifel acknowledged that there were interpersonal communication problems between complainant and Ms. Czyszak-Lyne and that she had spoken to both of them about these on-going issues. Ms. Zweifel also testified that she spoke to other staff about Ms Czyszak-Lyne's training style, and that at times, Ms. Czyszak-Lyne could be overly critical. Complainant did not offer any testimony or evidence that Ms. Czyszak-Lyne ever called her names, or verbalized or inferred anything inappropriate. Complainant stated that Ms Czyszak-Lyne made her feel stupid, but complainant never alleged that Ms. Czyszak-Lyne called her stupid or articulated how she made her feel stupid beyond being overly critical of complainant's errors. The Commission finds the allegation that complainant was treated in a degrading or disrespectful manner by Ms. Czyszak-Lyne was not established by the evidence and there was no probable cause to believe Ms. Czyszak-Lyne's treatment of complainant was motivated by race/color or age. In addition, the incidents described by complainant did not rise to the level of severity required for a finding of harassment.

Complainant next alleges that Ms. Zweifel, as her supervisor, failed to treat complainant professionally and failed to properly support complainant when she com-



plained. Ms. Zweifel testified as well as provided documentation that she met with complainant on September 24, 2001, to discuss work related problems. Ms. Zweifel met with Ms. Czyszak-Lyne on September 28, 2001, and then with both complainant and Ms. Czyszak-Lyne to discuss interpersonal communication issues between them. When performance issues were raised regarding complainant's prepping of medical charts, Ms. Zweifel provided additional training, including temporarily relocating complainant to a satellite office so that she would not interact with Ms. Czyszak-Lyne on a continuous basis. When problems continued to arise between complainant and Ms. Czyszak-Lyne, Ms. Zweifel spoke with Mr. Schlapper, Director of Administrative Services for University Health Services and two other supervisors. A decision was made to allow complainant to temporarily relocate to the medical reception area. The testimony and evidence provided during the hearing consistently showed respondent took prompt action when complainant brought issues to respondent's attention. In fact, during complainant's direct testimony she stated Ms. Zweifel was a wonderful boss. Complainant has not shown there is probable cause to believe that the respondent's procedure used in handling the continuing conflicts between complainant and Ms. Czyszak-Lyne were inappropriate or differed from respondent's normal course of action. Complainant testified that she had a good relationship with Ms. Zweifel. The evidence in the record substantiates the continued measures Ms. Zweifel and her supervisor took to provide complainant with additional training opportunities as well as a better working environment. The Commission finds the actions taken by respondent were not based on race/color or age, and the alleged incidents, taken as a whole or separately, would not rise to the level of severity required for a finding of probable cause as to harassment.

Regarding the allegation of numerous errors in complainant's work, Ms. Zweifel testified that both she and Ms. Czyszak-Lyne performed internal audits of the prepped medical charts. Because the charts were initialized, they knew which employees were making the errors. Ms. Zweifel independently audited the medical charts. Ms. Zweifel provided numerous opportunities for training. The work performance is-

sue, specifically the high rate of errors, was noted in the letter dated November 1, 1999, regarding a transfer of complainant to medical reception. The Commission finds any action taken by respondent was not based on race/color or age and the incidents would not rise to the level of severity required for a finding of probable cause as to harassment.

With respect to the incident when complainant was told to turn down her radio, Ms. Zweifel testified that she directed individuals to turn down their radios at the request of an employee with a hearing impairment. Ms. Zweifel testified that a student was allowed to wear headphones because she was on an independent project and didn't need to interact with the other staff. There is no evidence that respondent's handling of this matter was motivated by race/color or age. Taking complainant's characterization at face value, the alleged incident would not rise to the level of severity required to sustain a probable cause finding as to actionable harassment based on race/color or age.

The complainant also alleges she was told to do courier work. Ms. Czyszak-Lyne and Ms. Zweifel testified that it was part of the medical record employees' responsibility to fill in as couriers when there were staff shortages. Ms. Czyszak-Lyne also testified that she has had to fill in as a courier as well. There is no evidence that respondent's handling of this matter was motivated by race/color or age. Taking complainant's characterization at face value, the alleged incident would not rise to the level of severity required to sustain a probable cause finding as to an allegation of actionable racial harassment or harassment on the basis of race/color or age.

Lastly, the complainant alleges she was not given a regular schedule. The position description for the position of LTE Program Assistant 2, for which complainant was hired, was a split position between medical reception and medical records. Ms. Zweifel testified that complainant was relocated because of staff shortages as well as to accommodate complainant for additional training purposes and relieve some of the tension between complainant and Ms. Czyszak-Lyne. Specifically, complainant was moved temporarily to the 905 satellite office to provide her with additional training. In addition, complainant was also temporarily relocated to the 3<sup>rd</sup> floor for medical re-

ception in part because of the continuing interpersonal communication issues between complainant and Ms. Czyszak-Lyn and complainant's work performance problems. Taking complainant's characterization at face value, the alleged incident would not rise to the level of severity required to sustain a finding of probable cause as to harassment on the basis of race/color or age.

The Commission further concludes the above listed incidents did not reach the level of being severe or opprobrious whether considered separately or together. Complainant has failed to show probable cause to believe that an abusive working environment had been created for complainant as a result of race/color or age harassment by respondent. Commission finds complainant did not establish probable cause to believe that she was harassed because of her race/color or age by respondent with respect to the above listed incidents.

Complainant alleges she was discriminated against based on age, race/color or disability with regard to the denial of employment in a permanent position as Program Assistant 2 when a vacancy became available on the 3<sup>rd</sup> floor at the respondent's location. Because of the Commission's prior analysis and final determination that complainant did not meet the requirements of "an individual with a disability," we will look at the alleged discrimination allegations based on race/color and age. The Commission must go through the same procedure as stated previously in the case. Under the WFEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer has the burden of articulating a non-discriminatory reason for the actions taken which the complainant in turn, attempts to show was a pre-text for discrimination. *McDonnell*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Complainant meets the first element of a prima facie case because she is a member of groups protected by the Wisconsin Fair Employment Act. As to the second element, the position was originally posted as a Program Assistant 2 and then was cancelled and reposted as a Program Assistant 2 Medical. Complainant had been employed as a Limited Term Employee as Program Assistant 2, in a split position between medical records and medical reception. Complainant was not interviewed with

regards to her qualifications for the position nor was there testimony given on that point. Regarding the title of Program Assistant 2 and the position description of complainant's LTE position, it would seem that she was at least minimally qualified for the position, therefore meeting the second element of her prima facie case. With regards to the third and fourth element, complainant was not given the transfer, and a woman by the name of Patricia Stauffacher (Ms. Stauffacher) was given the position. In this case, the complainant, has established that she is a member of groups protected on the basis race/color and age. Where the case has been tried fully, it is unnecessary to analyze whether a prima facie case has been established, and the Commission should go ahead and address the question of pretext. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 403, 1983 U.S. LEXIS 141 (1983). In response to complainant's prima facie case, respondent satisfied its burden of articulating a nondiscriminatory rationale for its decision not to hire complainant into the Program Assistant 2 Medical. The individual who was hired had contractual transfer rights to the position. A human resource specialist testified for respondent there was no choice but to hire a contractual transfer. Complainant was told that she did not have the same rights as an LTE and a letter dated December 6, 1999, was sent to complainant explaining that she needed to contact the persons listed on the letter regarding reinstatement information if she' wanted to be considered for certain positions. There was no evidence of pretext associated with complainant not receiving the position she had applied for. This was not a discretionary hire. The Commission finds the testimony given was very credible regarding the respondent's policies and procedures with respect to contractual transfers.

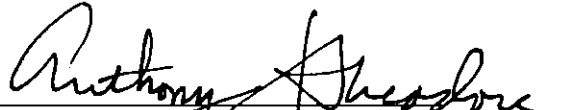
There is no probable cause to believe that respondent discriminated against complainant when respondent denied her a permanent position as Program Assistant 2.

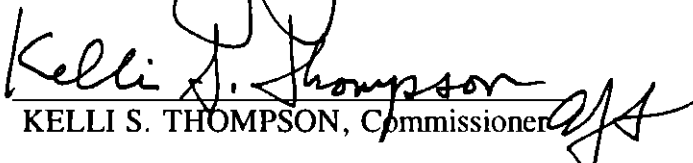
ORDER

The Commission concludes there is no probable cause to believe respondent discriminated against complainant as alleged. Therefore, this complaint is dismissed.

Dated: Sept. 5, 2002

STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

  
KELLI S. THOMPSON, Commissioner

KST/AJT 000008Cdec1.4

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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