STATE OF WISCONSIN PERSONNEL COMMISSION

JANELL M. KILIAN,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Respondent.

Case No. 01-0077-PC-ER

FINAL DECISION AND ORDER[A]

NATURE OF THE CASE

This is a case involving a complaint of alleged WFEA (Wisconsin Fair Employment Act; Subch. II, ch. 111, Stats.) discrimination on the basis of disability. The following statement of issues for hearing is set forth in the conference report dated July 26, 2001.

1. Whether respondent discriminated against complainant because of her disability when respondent decided she could not continue to work on a flex-time basis between January-May 2000.

2. Whether the following allegations of harassment based on disability are true and, if so, whether respondent is liable:

   a. daily harassment between November of 1999 until August 2000, by supervisors Vickie Davis and Ruth Belshaw regarding complainant's alleged inability to perform mail runs three times a day and to file mail; and
   b. harassment by co-workers starting in January 2000 (when the flex-time hours were suspended) which allegedly included coworkers ignoring complainant, talking about complainant outside of her office and coworkers failing to properly perform the mail runs and filing tasks which complaint contends she could not do because of her disability.

[A] The Commission adopts the proposed decision and order of the hearing examiner as its final disposition of this case, with a few changes. Any added footnotes are designated alphabetically rather than numerically.

During the course of the hearing, the examiner ruled that another issue—whether respondent discriminated against complainant on the basis of disability with regard to the termination of her employment—should be considered. This additional issue was added pursuant to *Hiegel v. LIRC*, 121 Wis. 2d 205, 359 N. W. 2d 405 (Ct. App. 1984)[B] and over the objection of the respondent.

FINDINGS OF FACT

1. Complainant was hired as a PA 1 (Program Assistant 1) in the DDB (Disability Determination Bureau), Division of Health, DHFS (Department of Health and Family Services), effective August 31, 1998.

2. The duties, responsibilities, and work activities of complainant's position are summarized in a PD (Position Description) dated September 2, 1998 (Exhibit R-105), which includes the following:

> This position provides program support assistance to disability specialists, medical consultants, and other clerical units Primary responsibilities include producing documents to request medical and work records for disability evidence, from claimants, medical providers, lay persons, other Social Security Offices and if necessary, letters to follow-up on previous requests. Also included is the preparation of final disability determinations, individualized claimant notification letters and production of reports of contact from dictation or written records. The position requires performance of various computer support functions. The position tasks include association and disposition of all correspon-

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[B] The Commission believes this case is consistent with *Hiegel* and distinguishable from those Commission cases which have not allowed amendments. For example, in *Chelcun v. UWSP*, 91-0159-PC-ER, 3/9/94, the Commission noted that it "generally has allowed amendments to add an alleged basis of discrimination, but not to add acts complained of which bear no relation to the act complained of in the original complaint." In this case, complainant checked off the box for "Termination" on the original complaint form, and in the narrative portion referred to "my being discriminating against and medically terminated from the State." Complainant was unrepresented and waived an investigation. The above issue for hearing was proposed by the hearing examiner. In the Commission's opinion, the termination should have been part of the issue but it probably was left out inadvertently. While complainant could have, but did not object to the statement of issue, these facts bring the case under the precedent established in *Hiegel*. Furthermore, at the hearing, respondent was given the choice of proceeding on the amended issue, or having the hearing continued while it prepared on the termination issue, and it elected to proceed. Respondent may well have considered this a Hobson's choice, but it did ameliorate to some extent any prejudice from lack of notice.

> dence related to claim files and routing and delivering claim files noting appropriate case actions necessary by other units in this Bureau. Mail handling includes pick-up and delivery of case files.

This position involved a substantial amount of handling of files, mail, etc., which required a substantial amount of walking and standing.

3. Complainant passed her probation effective May 27, 1999, on the basis of having performed satisfactorily to that point.

4. DDB processes all of the disability claims in Wisconsin for the U. S. Social Security Administration (SSA), and is 100% federally funded. A condition of this funding is that the DDB meet strict federal productivity, quality, and timeliness standards. At least partially because of this, DDB imposes standards on its case-processing and support staff, including PA 1's.

5. If PA 1's such as complainant were unable to be at work, or unable to perform all of their duties, this necessitated that their work be performed by other employees. One of the results of this was a negative impact on DDB's ability to meet federal standards, which could result in a negative effect on DDB's federal funding.

6. Due to staff shortages, DDB had a considerable backlog of cases from January 2000 to August 2000. These cases were "staged"—i. e., put in filing cabinets without processing where they were held until staff were available. This resulted in delays in processing cases and had a negative impact on DDB productivity.

7 On July 19, 1999, Vickie Davis, complainant's supervisor, placed complainant on a Performance Improvement Plan (PIP), see Exhibit R-108. As reflected in this document, complainant had used an amount of sick leave that was considered excessive, and had no accumulated sick leave remaining. Her attendance was to be closely monitored. Complainant was required to obtain medical certification with certain required types of information for any future absences, and to see a physician on the day of the absence if the leave were not previously approved. If she were to be unable to see a physician on that day, she was supposed to go to an urgent/immediate care facility, at the department's expense.

8. On December 28, 1999, complainant received a written reprimand (Exhibit R-113) for excessive absenteeism. At that time, complainant's attendance record since being placed on a PIP on July 19, 1999, included 47 hours of sick leave and 101.15 hours of leave without pay. She had used up her entire annual vacation, personal holiday, Saturday/legal holiday, and sick leave. She also had been verbally reprimanded during this period for having failed to see a physician in accordance with the PIP. This letter (Exhibit R-113) included the following paragraph:

> As an employee of DDB, you are expected to report to work as scheduled. The operational requirements of the DDB cannot be met when its employees fail to report to work. Please be advised that future use of sick leave in excess of that which you have earned will may [sic] in further disciplinary action up to and including discharge unless such leave time has been approved under the state and/or federal Family and Medical Leave Acts[1] Also, future violations of Work Rule # 14 [2] or any other work rules may result in further disciplinary action up to and including discharge.

9. After about the time she had passed probation on May 27, 1999, complainant was on a flex-time schedule under which she reported to work between 6:00 a. m. and 6:30 a. m. and left between 2:30 p. m.-3:00 p. m. In February 2000, DDB removed her from a flex-time schedule and put her on a regular schedule—i. e., 7:45 a. m. to 4:30 p. m.[3]

10. Complainant submitted a disability accommodation request form (Exhibit R-119) on or about January 7, 2000. This was in connection with physical restrictions recommended

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[1] Complainant did not file her complaint within the FMLA time limits. Her FMLA claim was processed as a separate case (01-0102-PC-ER), and was dismissed as untimely filed on July 11, 2001. Accordingly, no FMLA issue is before the Commission. This finding includes this reference to the FMLA to provide context to how respondent handled complainant's disability issues.

[2] "Failure to give proper notice when unable to report for or continue duty as scheduled, tardiness, excessive absenteeism, or abuse of sick leave privileges."

[3] Complainant testified that removing her flex-time schedule made it difficult to schedule medical and physical therapy sessions related to her disability, which before this she had usually done after 2:30—3:00 p. m. According to respondent, this was done in accordance with their standard policy to deny flex-time for employees on PIP's, because this ensured that such employees were at work when their supervisors were there to monitor and work with them, and to facilitate work flow. Since the decision to deny complainant flex-time occurred in February 2000, and this complaint was not filed until May 22, 2001, this complaint was not filed within the 300 days time period mandated by law, §PC 2.01, Wis. Adm. Code; §111.39(1), Stats., and the Commission can not consider the merits of complainant's contention that the denial of flex-time constituted discrimination on the basis of disablity.

by her podiatrist—that she should not participate in extended periods of walking or prolonged standing due to her foot condition, which he described as "plantar fasciitis right foot and is an overuse injury with inflammation of the ligament attached to the heel bone." He said the condition commenced July 1999, and was temporary in nature with an expected duration of six-twelve months. (Medical certification form dated January 24, 2000, last page of Exhibit R-119). This request was denied on February 16, 2000, by Gladys Benavides, the affirmative action and civil rights compliance officer, on the ground that: "The nature of the problem you described does not reach the level of a 'disability' as defined under the Rehabilitation Act and/or ADA (both federal laws). It is more appropriate for you to discuss this temporary problem with your immediate supervisor " (Exhibit R-119, first page)[4]

11. Complainant's supervisor provided, on a temporary basis, at least a partial accommodation, by reconfiguring her work so that she was not required to do some of the activities that involved prolonged walking or standing.

12. By a letter dated March 7, 2000 (Exhibit R-122), respondent asked another doctor to perform an IME (independent medical examination) and respond to four questions:

> We are concerned that Ms. Kilian's work restrictions have rendered it impossible to perform several critical job functions. The response you provide to the following questions will be utilized to assist us in determining the essential functions of her job.
>
> 1. Does Ms. Kilian have a condition or disorder which limits her ability, or renders her unable, to effectively and efficiently perform her duties?
> 2. If so, please describe Ms. Kilian's serious condition or disorder
> 3. How does her current condition or disorder affect her ability to perform the work described on the above and the previous page? Are the limitations permanent or of a short duration? How long might these limitations apply?
> 4. Please identify any accommodations which would allow Ms. Killian to perform the full range of her duties?[5]

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[4] Like the denial of flex-time, no issue relating to denial of this accommodation request is before the Commission because the complaint was not filed within 300 days of when this decision was made.

[5] This request generated a report by Dr. Kittelson that was not made part of the record.

13. An April 21, 2000, letter to complainant from the division administrator (Exhibit R-126) includes the following: "I am in receipt of medical information . from Dr. Randal S. Kittelson confirming your medical condition. Dr. Kittelson indicates that you suffer from chronic heel spur syndrome/plantar fasciitis of your right foot. This is to inform you that I am designating all leave time you have taken since your request dated January 19, 2000, as well as any future leave time you request relative to this condition as intermittent leave time taken under the provisions of the state and federal Family and Medical Leave Acts."[6]

14. On or about June 13, 2000, complainant requested leave without pay, with a beginning date of May 2, 2000, and an ending date of June 19-July 17, 2000. The form (Exhibit R-127, last page) she filled out includes the following explanation of the reason for the leave: "I have plantar fasciitis and an entrapped nerve. I had surgery to partially release this on 05/17/00, and I'm currently in the process of recovering." This request was approved for the period May 2, 2000, through July 16, 2000.

15. On or about July 11, 2000, complainant requested an extension of her leave from July 11-August 7, 2000, in connection with her surgery. This was granted in a July 20, 2000, letter to Ms. Kilian (Exhibit R-129), that notes that "[a]s of July 17, 2000, you had exhausted your leave entitlements under the state and federal Family and Medical Leave Acts. Upon your return to work, you must provide your supervisor with a 'Release to Work' statement from your health care provider. If there are restrictions upon your return to work, your health care provider must identify what the restrictions are and for what period of time these restrictions are to be accommodated."

16. Complainant returned to work on August 7, 2000. She was unable to do her normal job because of her physical restrictions, and she had an August 1, 2000, note from Dr. Finnell (Exhibit R-130, p. 2) which said that she could return to work on August 7, 2000, with the restriction that she not perform filing and mail runs as a result of her foot surgery. She worked from August 7-10, 2000. Due to her physical restrictions, respondent assigned complainant to work in the fiscal unit, which was on a different floor than where she had previously worked. This floor also was away from complainant's co-workers who, she alleged, had

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[6] As discussed above in note 1, there is no FMLA issue before the Commission.

been verbally harassing her prior to starting her leave of absence on May 2, 2000. At this time, respondent had a backlog of fiscal bills which needed to be alphabetized. Normally, this was one of the duties of the account specialists who worked in that unit, but some of this was given to complainant on a temporary basis. After she had worked there for a day or two she indicated she was unable to perform that work because of problems with her hands. On or about August 10, 2000, she presented a note from Dr. Finnell (Exhibit R-130) which requested that complainant be allowed to keep her foot elevated at all times, and to be excused from work on August 10, 2000, for an appointment. She also presented another August 10, 2000, note from Dr Finnell (Exhibit R-130), requesting that she be allowed to work for eight hours per day for three days a week. Complainant never returned to work after August 10, 2000.

17 Respondent did not grant the requested accommodation of a three day, eight hour per day work week, and decided to medically terminate complainant's employment. Respondent's reasons for this decision involved the need to meet the stringent demands imposed by the SSA processing requirements, which in turn directly affected respondent's federal funding. The ability to meet the SSA requirements depended on having DDB staff present at work and able to discharge their duties and meet their performance expectations. When complainant was absent from work, the work she normally would have done had to be taken care of by other PA 1's, which in turn meant they could not take care of all the work they normally performed. Similarly, when complainant was at work but unable to discharge all of her duties because of her physical restrictions, someone else had to do this work. Both situations contributed to the DDB backlog and negatively affected its output. DDB needed to have all of its authorized positions staffed by full time employees in connection with the SSA performance criteria.

18. In an August 24, 2000, letter to complainant (Exhibit R-133), respondent advised her of its intention to medically separate her from state service effective August 31, 2000. This letter includes the following:

> According to the medical information provided by Dr John A. Finnell, you are incapable of working more than 3 8-hour workdays per week. He further states that you may only perform seated, non-weight bearing activities. You have been on a full-time medical leave of absence since May 2, 2000, which expired

> on August 6, 2000. Other than 4 days during the week of August 7, 2000, when you unsuccessfully tried to return to work, you have not worked since you left the office on August 10, 2000. You have exhausted all leave entitlements available to you by statute and contract and are currently on an unauthorized leave without pay.
>
> While it is clear that you have a medical condition that prevents you from performing the full spectrum of your duties, DDB must nevertheless continue to provide quality service to claimants. Other employees have been performing all or part of your work assignments since January of this year. This has contributed to a backlog that is negatively impacting claimants. In short, we are unable to fulfill the bureau's mission unless our employees report to work as scheduled and perform the essential functions of their positions. Since you are medically incapable of doing either, we are left with no alternative other than medical separation.
>
> If you have written certification from your health care provider that you are able to perform your duties with no restrictions, you may present this information to your supervisor and DDB Deputy Director Ruth Belshaw at a meeting scheduled for Thursday, August 31st at 9:00 a.m. in Ms. Belshaw's office. If you are unable to provide this information, your last day of employment will be August 31, 2000.

19. Complainant neither attended the August 31st meeting nor submitted certification of her ability to work without restrictions. Complainant left a voice mail with Ms. Belshaw "indicating that you [complainant] did not have medical documentation allowing you to work full time and that you did not see the need to attend this meeting." (Exhibit R-135, September 15, 2000, letter notifying complainant of her medical separation.)

20. Respondent terminated complainant's employment for the reasons set forth in the August 24, 2000, letter (Exhibit R-133), effective August 31, 2000. Respondent notified complainant of the termination in an August 31, 2000, letter (Exhibit R-135). As of the date of the hearing (November 12, 2001), complainant was unable to work and on SSDI.

21. Complainant has had chronic heel spur syndrome/plantar fasciitis of her right foot since at least April 2000. This impairment has limited her capacity to work since about that time. Complainant has had a record of this impairment since on or about April 21, 2000.

22. Complainant filed her complaint with this Commission on May 22, 2001. This complaint was filed using a complaint supplied by the ERD (Equal Rights Division). The ERD

is part of the Department of Workforce Development, and is the agency responsible for processing WFEA complaints filed against employers other than the state. Complaints filed against the state as the employer are processed by this Commission pursuant to §111.375(2), Stats. Because the ERD complaint forms are not set up for notarized signatures, which are required on Commission complaints pursuant to §PC2.02(2), Wis. Adm. Code, complainant was asked to provide her complaint on a Personnel Commission form in notarized format[7], which she did, filing it on June 11, 2001.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish that this complaint was filed in a timely manner pursuant to §§111.39(1), Stats., and PC 2.01, Wis. Adm. Code.

3. Complainant has not satisfied her burden of proof in part. This complaint was untimely filed with respect to all alleged acts of discrimination which occurred prior to July 26, 2000, and therefore is timely only with regard to respondent's decision that it could not grant the requested accommodation of a 60% time position, and that in light of complainant's absenteeism and physical restrictions it had to terminate her employment.

4. Complainant has the burden of proof to establish that respondent's decision that it could not grant the requested accommodation of a 60% time position, and that in light of complainant's absenteeism and physical restrictions it had to terminate her employment, was in violation of the WFEA.

5. Complainant has not satisfied her burden of proof. Respondent's decision that it could not grant the requested accommodation of a 60% time position, and that in light of complainant's absenteeism and physical restrictions it had to terminate her employment, did not violate the WFEA.

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[7] Under these circumstances, the notarized form is also referred to as a "perfected" complaint.

OPINION

Before addressing the merits of this complaint, the Commission must address the question of timeliness raised by respondent.[8] The time limit for filing WFEA complaints is 300 days after the date of the alleged discrimination. §§111.39(1), Stats., PC2.01, Wis. Adm. Code. Since complainant initially filed her complaint with this Commission on May 22, 2001, it is untimely with regard to any act of alleged discrimination that occurred more than 300 days prior to that date—i. e., anything prior to July 26, 2000.[9] This means that the complaint was not timely filed with regard to respondent's decision in February 2000 to prohibit further flextime for complainant. Also, complainant's allegation about being verbally harassed by coworkers is untimely, because the only time she was at work on or after July 26, 2001, was August 7-10, 2001, when she was reassigned to the fiscal unit, which was on a different floor than where she previously had worked, and where she was not subject to contacts with her coworkers.

Even if this alleged verbal harassment were deemed a continuing violation, this does not make this complaint timely. Even a continuing violation requires that there be a violation of the law within the 300 days period of limitation. *See, e. g., Womack v. UW-Madison,* 94-0009-PD-ER, 7/25/94.

Of the issues for hearing set forth in the July 26, 2001, conference report,[10] the only issue which at least nominally is timely is 2. a. However, the only possible "harassment"

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[8] Respondent raised this issue at the prehearing conference held July 24, 2001. It was determined at that time that rather than trying to resolve the issue before the hearing, it would be addressed at the hearing and in post-hearing briefs.

[9] Respondent contends that the 300 day time period should be calculated using June 11, 2001, the date complainant filed her "perfected" or notarized complaint. However, §2.02(3), Wis. Adm. Code, provides that that an amendment to a complaint to cure a technical defect dates back to the date the original complaint was filed. *See also Saviano v. DP,* 79-PC-CS-335, 6/28/82.

[10] 1. Whether respondent discriminated against complainant because of her disability when respondent decided she could not continue to work on a flextime basis between January-May 2000.

2. Whether the following allegations of harassment based on disability are true and, if so, whether respondent is liable:

a. Daily harassment between November of 1999 until August 2000, by supervisors Vickie Davis and Ruth Belshaw regarding complainant's alleged inability to perform mail runs three times a day and to file mail; and

which could have occurred after July 26, 2000, was when complainant was temporarily assigned to the fiscal unit on the days she was actually at work, August 7-10, 2000. Laying to one side the issue of her termination from employment, the only possible discrimination by her supervisors in connection with her temporary reassignment to the fiscal unit involves complainant's argument that her assignment in the fiscal unit was repetitive hand work which was difficult for her because of a problem with her hand, and that she should have been allowed to stay in her original unit and to do the work she was able to do while remaining seated. Complainant had no competent evidence that her hand problem was a disabling condition under the WFEA. Since the fiscal job did not involve the walking or standing from which Dr Finnell had asked her to be excused, it represented a temporary alternative accommodation, and does not provide evidence of discrimination.

Turning to the issue of complainant's termination from employment, in *Target Stores v. LIRC,* 217 Wis. 2d 1, 576 N. W 2d 545 (Ct. App. 1998), the Court of Appeals laid out the method of analysis for a disability[11] discrimination case such as this:

> The complainant in a disability discrimination case must show that (1) he or she is disabled within the meaning of the WFEA, and that (2) the employer took one of the enumerated actions[12] on the basis of disability. The employer than has the burden of proving a defense under §111.34(2), Wis. Stats. Under §111.34(2)(a), it is not a violation of the WFEA to take an employment action based on an individual's disability "if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment " However, if an employer refuses to reasonably accommodate an employee's (or prospective employee's) disability and is not able to demonstrate that the accommodation would pose a hardship, than the employer violates the WFEA. Reading the two paragraphs of §111.34 together, once the employee has made the first two showings, the employer must either show that a reasonable accommodation would pose a hardship--

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b. Harassment by co-workers starting in January 2000 (when the flex-time hours were suspended) which allegedly included coworkers ignoring complainant, talking about complainant outside of her office and coworkers failing to properly perform the mail runs and filing tasks which complaint contends she could not do because of her disability.

[11] In *Target,* the Court used the term "handicap" instead of the term "disability" nomenclature found in the current statute, e. g., §111.32(8), Wis. Stats. This terminology was changed by 1997 Wis. Act 112, effective May 1, 1998. Accordingly, we have substituted the term "disability" wherever the Court used the term "handicap."

[12] E. g., discharge, refusal to hire, etc. *See* §111.322, Wis. Stats.

> §111.34(1)(b), or that even with a reasonable accommodation, the employee cannot "adequately undertake the job-related responsibilities"--§111.34(2)(a). (footnotes and citations omitted)

The first question the Commission must address is whether the complainant has established that she was an "individual with a disability," §111.32(8), Wis. Stats., during the relevant time frame. The complainant satisfied her burden of proof on the basis of her own testimony and some of the documents respondent submitted as exhibits. Respondent's April 21, 2000, letter to complainant (Exhibit R-126) includes the following: "Dr. Kittelson indicates that you suffer from chronic heel spur syndrome/plantar fasciitis of your right foot. This is to inform you that I am designating all leave time you have taken since your request dated January 19, 2000, as well as any future leave time you request relative to this condition as intermittent leave time taken under the provisions of the state and federal Family and Medical Leave Acts and your labor contract." This letter reflects that complainant had a "physical impairment," §111.32(8)(a), Stats. It is clear that this physical impairment "limited [her] capacity to work," *id.*, because, as is discussed further below, she frequently was unable to work at all, and while at work she was unable to perform significant parts of her assigned duties. Her condition was characterized as "chronic," which is an indication it was not of limited duration. Also, respondent reached the conclusion that she had a qualifying "serious health condition," §103.10(g), Stats., under the FMLA (Family Medical Leave Act). That law provides that a "'serious health condition' means a disabling physical or mental illness, injury, impairment or condition involving 1. inpatient care in a hospital . [or] 2. outpatient care that requires continuing treatment or supervision by a health care provider " The term "disabling" in this statute has been interpreted as follows:

> Webster;s *Third New Int'l. Dictionary* 642 (Unabr. 1976) defines "disabled" as "incapacitated by or as if by illness, injury, or wounds." It further defines "disability" to include "the condition of being disabled: deprivation or lack esp. of physical, intellectual, or emotional capacity or fitness the inability to pursue an occupation or perform services for wages because of physical or mental impairment a physical or mental illness, injury, or condition that incapacitates in any way." *Id. MPI Wisconsin Machining Division v. DILHR,* 159 Wis. 2d 358, 368, 464 N. W 2d 79 (Ct. App. 1990)

This provides a strong indication that complainant's condition was a "physical impairment" under the WFEA, §111.32(8)(a), Wis. Stats. Also, respondent's August 24, 2000, letter to complainant (Exhibit R-133) states: "it is clear that you have a medical condition that prevents you from performing the full spectrum of your duties." Under these circumstances, and in the absence of any evidence from the respondent disputing the medical basis of her condition or its effect on her ability to work, the Commission concludes that the complainant has satisfied her burden of proof on this factor.

The next question is whether complainant established that respondent took an adverse employment action because of her disability. It is clear that complainant was discharged because of her absences and her inability to perform essential job functions when she was at work. It is undisputed that at least a significant part of her absenteeism was caused by her disability—e. g., she was absent after her foot surgery in May 2000 until she was able to return to work for only a few days from August 7-10, 2000. It also is undisputed that her inability to perform essential job functions was due to her physical restrictions caused by her foot condition.

The next question is whether respondent has been able to establish an affirmative defense under §111.34(2)(a), Wis. Stats., by showing that the disability was reasonably related to the complainant's ability to do her job—i. e., that the disability prevented the complainant from satisfactorily discharging her duties. Respondent's position on this affirmative defense is two-fold—first, complainant's absences periodically prevented her from discharging any of her duties, and, second, even when she was present at work her disability prevented her from performing a substantial part of her required tasks.

With regard to complainant's absenteeism, the record reflects that complainant missed a great deal of work, and that much of these absences were attributable to her disability. While she was at work, her medical restrictions prevented her from engaging in any prolonged weight-bearing activities—i. e., standing or walking—and she was not able to do mail runs or filing. Complainant contends that she was able to perform most of her duties while seated. She points out that there was inconsistent testimony from Ms. Belshaw (DDB deputy director), who estimated that complainant could not perform 60-70% of her assigned work, and Ms.

Davis (complainant's immediate supervisor), who estimated that complainant could not perform 50% of a normal day's activities. Complainant also contends that based on Ms. Davis's analysis of the specific activities in her (complainant's) PD, the part of her job she could not perform was limited to about 15%.[13] In the Commission's opinion, Ms. Davis, as complainant's immediate supervisor, who had to arrange the performance of complainant's work by other employees when complainant was absent or unable to do the entire job, was in a good position to know what complainant was able to do and not do because of her restrictions. The record supports a finding that complainant's medical restrictions made it impossible for her to perform a significant part of her job, and that this created a significant impairment in DDB's ability to meet its federally-mandated performance criteria.

The next question is whether respondent satisfied its duty of accommodation. Complainant's podiatrist advised (Exhibit R-130) that she should only work three days a week. Based on the BDD workload, federal performance requirements, and staffing level, BDD needed all of its employees working full time. Changing complainant's schedule to 60%, as Dr Finnell advised, would have involved a "hardship" to respondent pursuant to §111.34(1)(b), Stats. under these circumstances. Furthermore, in addition to complainant's work restrictions, her overall attendance record was very poor. A good deal of the time she was absent was attributable to her disability. Complainant appears to take the position that so long as she was complying with the restrictions respondent placed on her attendance (see Exhibit R-108, R-130)—e. g., providing certification with regard to absences, etc.—respondent could not legally discharge her. However, the WFEA does not require that employers must accept absenteeism indefinitely, merely because it is related to a disability. *See Passer v. DOC,* 90-0063-PC-ER, 9/18/92. In light of both complainant's physical restrictions and record of absenteeism, respondent was neither required to provide accommodations of either a

[13] This assumes that the individual worker activities which comprise each goal, to which the PD does not assign percentages, consume the same amount of time. For example, activity D5, associating correspondence with cases, is part of goal D "Association and disposition of all incoming correspondence required in the development of claims." (Exhibit R-105). Goal D is designated 20% of the total job, but activity D5 does not have a specific percentage assigned.

part-time schedule, or reassignment to a different position, nor continue complainant's leave of absence indefinitely.

In her post-hearing briefs, complainant addresses other matters that were outside the scope of the issues for hearing and/or involve questions that cannot be addressed because complainant did not file her complaint within 300 days of their occurrence as required by the WFEA, §111.39(1), Stats. For example, on February 16, 2000, respondent formally denied complainant's request for an accommodation with regard to walking and prolonged standing.[14] However, the Commission cannot rule on any alleged acts of discrimination which occurred before July 26, 2000.[15] Also, respondent denied complainant further use of flex-time in February 2000. This also was prior to July 26, 2000, and therefore this complaint is untimely with regard to the denial of flex-time.

In conclusion, complainant's foot problem unfortunately made it impossible for her to perform a significant aspect of her assigned work, and contributed to extensive absenteeism. In light of the nature of the work performed by DDB and the need to conform with federal performance standards as a condition of funding, respondent's decision that it could not continue complainant in employment, and were unable to provide a 60% time position, did not violate the WFEA.

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[14] This accommodation was partially granted on a temporary basis until complainant went on a medical leave of absence, and respondent ultimately decided to terminate her employment.

[15] This date is 300 days before complainant filed her complaint on May 22, 2001.

ORDER

The Commission having concluded that respondent did not discriminate against complainant in violation of the WFEA, this complaint is dismissed.

Dated: April 26, 2002.

STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

KELLI THOMPSON, 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