

**MARY LOUISE CURWEN,**  
*Complainant,*

v.

**Chairperson, UNIVERSITY OF  
WISCONSIN HOSPITAL AND CLINICS  
BOARD,**  
*Respondent.*

**RULING ON  
RESPONDENT'S  
MOTION TO DISMISS**

Case No. 01-0098-PC-ER

The above-noted case is pending investigation at the Commission. On August 8, 2001, respondent filed a motion to dismiss, in lieu of filing an Answer to the complaint. Both parties filed written arguments.

The facts recited below are made solely to resolve this motion. They are undisputed unless specifically noted to the contrary.

#### FINDINGS OF FACT

1. This complaint was filed on June 14, 2001, alleging disability and age discrimination. Complainant was born on April 26, 1927 (74 years old at the time she filed this complaint).

2. Complainant was employed as a custodian for 27 years. She has medical problems resulting, at least in part, from a work injury. Based on medical reports of permanent restrictions, respondent concluded she could no longer work as a custodian. Respondent assigned her to a more sedentary job in the Medical Records Department coding and filing from July 19<sup>th</sup> until August 4, 1999, but she was unable to perform the job due to her medical condition. She has been on medical leave since August 12, 1999. (See, respondent's motion p. 2, respondent's subsequent 9/17/01 submission and exhibits G through M attached thereto, last page of complainant's 7/9/01 letter and last page of her 9/4/01 letter.)

3. A physician's report dated November 2, 1999 (exhibit 3 attached to respondent's motion), indicates that due to a work injury on April 12, 1999, complainant has

degenerative disc disease, rotator cuff tendonitis and myofascial pain. The report noted the following limitations: a) may occasionally<sup>1</sup> bend, twist, squat, kneel and crawl; b) may not climb stairs or a ladder; c) may lift no more than 20 pounds; d) may carry and push/pull no more than 25 pounds; e) avoid lifting with overhead reaching combination; and e) may occasionally reach above her shoulder.

4. Complainant indicates (letter dated July 9, 2001) that she no longer experiences dizziness. This improvement is due to removal of a tumor on her salivary gland, which had been pressing on her inner ear. This improvement allows her to climb stairs. Complainant also indicates the physician says she now may lift 50 pounds occasionally. She also is able now to reach above her shoulder (See pp. 2 & 4, complainant's 9/4/01 letter and attached physician report dated April 12, 2001.)

5. Complainant alleges discrimination in regard to events that occurred prior to August 12, 1999, when her medical leave began. Some of these allegations already were raised and considered in Case No. 96-0147-PC-ER, with the issuance of an initial determination, which found no probable cause to believe that the alleged discrimination occurred. Ultimately the prior case was dismissed on June 10, 1998, because she withdrew her complaint.

6. The allegations raised in the present complaint that also were raised in the prior case are: a) age harassment based on a comment from Jenkins in October 1996; b) age discrimination in regard to a lower pay rate when she was reinstated in 1993; c) age discrimination in regard to a denied transfer request on July 3, 1996; d) disability accommodation discrimination based on alleged failure to provide assistance on medical restrictions and e) disability discrimination with regard to the denied transfer request on July 3, 1996.

7 The remaining allegations (those not listed in the prior paragraph) raised in the present complaint, which allegedly occurred before August 12, 1999 when her medical leave began, include: a) disability harassment in 1998, by a co-worker whose name complainant does not wish to disclose; b) complainant's request to have the refrigerator on her floor fixed; c)

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<sup>1</sup> The choices listed on the form included "never", "rare", "occasional" and "frequently"

complainant was told she wasn't keeping up with her work; d) complainant was required to stay in positions for 6 months after she transferred into the position, while others were not held to the 6-month time requirement; e) events surrounding complainant's conversation with her "head supervisor on day shift" about "something in life;" f) complainant was not given first chance to leave the 7<sup>th</sup> floor and return to her prior floor; and g) complainant was disciplined twice (including a 2-day suspension) for talking too loud. (See, attachment to complaint, pp. 2-6.)

8. Complainant indicated in her present complaint that she needs to work, is able to work and wants to work. She said she called respondent's Payroll Office, Employee's Health Office and Human Resources Department and despite these contacts respondent has not let her return to work (attachment to complaint, pp. 1-2).

9. On April 21, 2000, complainant contacted Fran Ircink with respondent's Employee Health Services and inquired about returning to work. Ms. Ircink reviewed medical records on file and determined that complainant could not return to work as a custodian. She did not advise complainant about alternative employment but indicated that the Human Resources Department and Worker's Compensation needed to talk to complainant about return-to-work issues. (See, attachments D & E to respondent's 9/17/01 submission).

10. On September 20, 2000, complainant attended a meeting to discuss her desire to return to work. Minihan and Ircink were present as was Eddie Young, union steward, and Peg Adamowicz, Environmental Services Day Manager. Complainant was advised at this meeting that due to her physical restrictions she could not work as a custodian, food service worker or laborer. Complainant was advised to seek promotional opportunities in jobs that could meet her medical restrictions and the process for doing so was discussed. Minihan summarized the meeting in an e-mail message as follows (attachment F to respondent's 9/17/01 submission):

Peg Admowicz, myself and the unit met with (complainant) yesterday and Mary was not pleased that she is not able to work as a Custodian . The recommendation from the IME [Independent Medical Exam] and our Employee Health Service was that she is not able to work as a Custodian and they also listed numerous physical restrictions she has. The restrictions are so severe that we are unable to return her as a Custodian or Food Service Worker. She wants

to work but will not take any exams to try to promote to another position, as the union recommended. The union explained to her that she was fortunate that we still had her on Leave and have not ended her employment yet. She has said she will probably contact "Faisal or Donna" or see her attorney.

11. Complainant has not applied for promotional opportunities.

12. Complainant wonders why respondent is not doing for her what it has done for other employees. One employee in Housekeeping hurt her shoulder at work and attempted to return to work and respondent is now training her for an office position. Another employee injured her back and respondent is sending her to school. A supervisor, Diane, retired to take care of her daughter. Diane returned in two months at which time respondent created a new position for her. (See pp. 3 & 6 of attachment to the complaint.)

13. On May 17, 2001, complainant called Gary Johnson, a union representative, saying she wanted to return to work. Mr Johnson informed Susan Minihan, Employee Relations Consultant in respondent's Human Resources Department, of complainant's request by e-mail dated May 17, 2001 (attachment C to respondent's 9/17/01 submission). Respondent did not respond to complainant.

14. On July 11, 2001, respondent received a letter from complainant requesting to return to work and indicating that her medical condition had improved. Complainant's letter is dated June 26, 2001. (See respondent's motion and, in particular, Minihan's affidavit and exhibit 4 attached thereto.)

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b), Stats.
2. Complainant failed to meet her burden to show that the allegations noted in ¶¶6 & 7 of the Findings of Fact were timely filed.
3. The allegations noted in ¶6 of the Findings of Fact are barred by claim preclusion.
4. Complainant met her burden to establish that allegations regarding her attempts to return to work in September 2000 (¶10, Findings of Fact) and in May 2001 (¶15, Findings of Fact) were timely filed.

5. Allegations concerning complainant's July 11, 2001 request to return to work cannot be considered part of this case because such events occurred after this complaint was filed.

#### OPINION

Respondent moved to dismiss the entire complaint on the basis of timeliness. The Commission grants the motion in part and denies it in part, as explained below.

Complaints filed under the Fair Employment Act (FEA) must be filed no more than 300 days after the alleged discrimination occurred, as noted in §111.39(1), Stats. The statutory term "occurred" usually means the date of notice of the alleged discriminatory act; i.e., the date complainant was notified that his employment was terminated. *Hilmes v. DILHR*, 147 Wis. 2d 48, 53, 433 N.W. 2d 251 (Ct. App. 1988). Complainant has the burden to demonstrate that the allegations raised in the complaint were timely filed. See, for example, *Wright v. DOT*, 90-0012-PC-ER, 2/25/93; *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98; *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98; and *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98.

Complainant has been on medical leave since August 12, 1999. Allegations regarding events occurring prior to August 12, 1999, occurred more than 300 days before the complaint was filed on June 24, 2001 and are dismissed as untimely. The allegations dismissed here are as noted in ¶¶5, 6 and 7 of the Findings of Fact. Further, the allegations noted in ¶6 of the Findings of Fact already were litigated and are subject to dismissal on that basis too. See, for example, *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98 (The doctrine of claim preclusion holds that a final judgment is conclusive in all subsequent actions between the same parties and the same transaction as to all matters which were litigated or which might have been litigated in the former proceeding.)

Two allegations remain and cannot be dismissed as untimely filed. The first is respondent's failure to return complainant to work (either in her custodial or in another position) pursuant to discussions held on September 20, 2000 (see ¶10, Findings of Fact). The second is respondent's failure to contact complainant or otherwise respond after receiving

Two allegations remain and cannot be dismissed as untimely filed. The first is respondent's failure to return complainant to work (either in her custodial or in another position) pursuant to discussions held on September 20, 2000 (see ¶ 10, Findings of Fact). The second is respondent's failure to contact complainant or otherwise respond after receiving notice on May 17, 2001, that complainant wished to return to work (see ¶13, Findings of Fact). These events occurred within the 300-day period prior to June 14, 2001, when this complainant was filed and include complainant's allegations that she was treated differently than other employees (see ¶12, Findings of Fact).

Respondent moved to dismiss complainant's request to return to work on July 11, 2001 (¶1 4, Findings of Fact), on the grounds that this occurred *after* this complaint was filed on June 14, 2001. Complainant must file a new complaint form with respect to this additional allegation.

#### ORDER

Respondent's motion to dismiss granted with respect alleged discriminatory acts occurring prior to August 12, 1999, as noted in ¶¶5, 6 and 7 of the Findings of Fact

Respondent's motion to dismiss allegations relating to its failure to return complainant to work in September 2000 and May 2001 is denied and the investigation of these claims will continue.

Respondent's motion to dismiss allegations relating to complainant's request to return to work in July 2001, is granted without prejudice; meaning complainant may pursue this allegation by filing a separate complaint.

Dated: January 24, 2002.

JMR:010098Crull

STATE PERSONNEL COMMISSION

  
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JUDY M. ROGERS, Commissioner

  
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ANTHONY J. THEODORE, Commissioner