

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JAMES GANTHER,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF REVENUE,**  
*Respondent.*

FINAL DECISION AND  
ORDER

Case No. 97-0152-PC-ER

A Proposed Decision and Order (PDO) was mailed to the parties on June 7, 2001. Complainant filed objections by letter dated August 18, 2001 and respondent replied by letter dated August 30, 2001. The Commission has considered the parties' arguments. The Commission agrees with the hearing examiner's credibility assessments but the majority disagrees with the legal conclusion that complainant established he was an individual with a disability. Other changes were made to the PDO for clarification and correction, and to address the main arguments raised by the parties. These changes are denoted by alphabetical footnotes.

#### NATURE OF THE CASE

This case involves a complaint of discrimination on the basis of disability. In an order entered March 22, 2000, the Commission established the following issue for hearing: "Whether respondent discriminated against complainant on the basis of disability when it allegedly failed to rehire him on a permissive transfer basis into a Revenue Auditor position in Office Audit Unit K between October 1996 and July 1997 "

#### FINDINGS OF FACT

1. At all times relevant to this matter, complainant has been employed by respondent as a Revenue Agent 3.
2. In 1994, complainant received a written reprimand for placing harassing telephone calls to a female co-worker

3. On June 13, 1996, respondent was contacted by the City of Madison Police Department and informed that the co-worker, who was no longer employed by respondent, had filed a police complaint against complainant for placing harassing telephone calls to her home and office. Respondent conducted its own investigation of this matter. Complainant was placed on paid administrative leave from June 13, 1996, through September 22, 1996, during this investigation. As the result of respondent's investigation of the matter described above, complainant was suspended without pay for three days for the period August 1 (Thursday), 2 (Friday) and 5 (Monday), 1996.<sup>^</sup>

4. In a letter dated July 26, 1996, complainant was directed by Vicki Siekert, Director, Compliance Bureau, to report for an independent medical examination (IME) by Eric Hummel, a licensed psychologist. The reason for the request for the IME was that management was concerned about complainant's behavior related to the activity which caused the reprimand and ultimately a three-day suspension without pay (see Findings 2 and 3).

5. Respondent asked Dr. Hummel to respond to specific questions, including complainant's propensity for harassing behavior, whether he posed a threat, and whether he was disabled and in need of treatment. See Respondent's Exhibit 9. Dr. Hummel's response to the questions are set forth in said exhibit. In summary, he concluded that complainant was a low physical threat, and was at a moderate level of risk with regard to harassing behavior. With respect to the specific question "Does Mr. Ganther have a mental disability? If so, does this disability prevent him from performing any of his essential functions of his job?" he answered as follows:

Mr. Ganther has personality characteristics and current functioning which would result in a diagnosable condition, using the Diagnostic and Statistical Manual-IV. However, he does not have a mental disability which would prevent him from performing the essential functions of his job given the position description I reviewed.

With respect to the specific question "If Mr. Ganther is disabled, what are reasonable accommodations so that he can perform the specific functions of his job?" Dr. Hummel answered as follows: "The problems Mr. Ganther will have performing his job whether or not he has a dis-

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<sup>^</sup> The suspension dates were clarified.

ability is acting appropriately with female coworkers when he has a social interest in them and they do not share his interest or make him frustrated or angry." Dr. Hummel also stated that complainant was in need of psychological treatment.

6. Dr. Hummel's letter was sent to Diane Hardt, the Administrator of the Income, Sales, and Excise Tax Division, and Michael Kaphingst, Director of the Human Resources Bureau, and they were the only ones in DOR who were aware of the letter. Neither of these individuals played any role in the subject matter of this complaint--i. e., complainant's failure to have been rehired in Office Audit Unit K between October 1996 and July 1997.

7. Complainant suffered from depression at times relevant to this case (between October 1996 and July 1997) but not on a continuous basis.<sup>B</sup> At hearing, complainant testified that his depression had a negative emotional effect and made it very difficult for him to concentrate on certain tasks.

8. During the fall of 1996, the respondent reorganized its operation. This resulted in the movement of the Sales Tax Office Audit Unit from the Compliance Bureau to the Audit Bureau, where it was renamed Office Audit Unit K. As the result of this reorganization, of the

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<sup>B</sup> Paragraph 7 of the Findings of Fact was changed. The record is insufficient to support a conclusion that complainant suffered from depression on a continuous basis during the relevant time period here. Complainant's Exhibit 2 is a medical note of his treatment on February 14, 1994 and Exhibit 1 contains medical notes of treatment on March 8 and 22, 1994. These exhibits record that complainant was diagnosed as suffering from depression with insomnia, a condition that required medication. Exhibit 4 contains notes of treatment complainant obtained on April 28 and May 14, 1997, which include the assessment of depression and insomnia and reports of not feeling well physically. Complainant's Exhibit 3 contains a treatment note dated May 30, 1997, where medications for depression were discussed. This note contains a reference that complainant was continuing counseling with Sven Midelfort, a person other than the doctor who wrote the note. The record does not reveal when his treatment with Midelfort started or ended. Complainant's Exhibit 4 also contains a treatment note of October 2, 1997 and the first portion of a treatment note of October 3, 1997; both relating to a review of the medications complainant was taking for depression. Dr. Hummel evaluated complainant on July 31 and August 6, 1996, and issued a report on September 16, 1996 (Respondent's Exhibit 9, pp. 2-3). Complainant told Dr. Hummel that at some time in 1994 he discontinued taking these medications (Respondent's Exhibit 9, p. 5). In this report, Dr. Hummel specifically noted that complainant showed no "current signs of active depression or anxiety" (*Id.*, p. 3), and that while Dr. Peter Weiss had recommended treatment, it was unclear that complainant had started the treatment (*Id.*, p. 6). There is no medical documentation that complainant's depression interfered with his ability to work. The only medical documentation of any emotional problems is found in Dr. Hummel's report and is discussed in the context of "personality characteristics" (*Id.* at pp. 5-8).

nine Revenue Agent positions in the Sales Tax Office Audit Unit, seven were reassigned to the Audit Bureau, and two were reassigned to other units in the Compliance Bureau.

9. One of the seven positions that was reassigned to Office Audit Unit K had no incumbent at the time of reassignment. Previously it had been filled by Ann LaForce, and had functioned as a lead worker at the Revenue Agent 4 level.<sup>C</sup> Ms. LaForce resigned prior to the reorganization, and respondent neither filled this position, took steps to fill it, nor had an intention to fill it, at any time during the relevant time period (October 1996-July 1997). The position was filled in January 1998 at a Revenue Auditor 1 level.<sup>D</sup>

10. Management decided that the most senior employee in each pay range (11, 12 and 13) in the Sales Tax Office Audit Unit would be reassigned to Office Audit Unit K, leaving the least senior employees remaining in the Compliance Bureau (Complainant's Exhibit 9).<sup>E</sup> Complainant was the least senior Revenue Agent in pay range 13 (i. e., Revenue Agent 3) and was reassigned to the Vehicle Review Unit in the Compliance Bureau. Greg Prochaska, the least senior Revenue Agent 1 (pay range 11), wanted to stay in the Compliance Bureau and, accordingly, was reassigned on a voluntary basis to the Vehicle Review Unit.<sup>F</sup> The Sales Tax Office Audit Unit only had one person, Stanley Hook, assigned to pay range 12 (i. e. Revenue Agent 2) leaving him as the least and the most senior person at this pay range. He was transferred to Office Audit Unit K. Such transfer was consistent with management's intent to transfer the most senior employee in each pay range to Office Audit Unit K.<sup>G</sup>

11. The positions reassigned to the Audit Bureau were reallocated to Revenue Auditor 2 or 3 classifications. No salary changes resulted from the reorganization for any of these Revenue Agent/Revenue Auditor positions<sup>I</sup> From a professional standpoint (particularly in

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<sup>C</sup> The first two sentences were amended for clarification.

<sup>D</sup> Changes were made to ¶ 9 to reflect that the position previously held by Ms. LaForce ultimately was filled and to provide related information.

<sup>E</sup> This sentence was changed for clarification.

<sup>F</sup> This sentence is a combination of two sentences in the PDO, with the added observation that Prochaska volunteered for transfer to the Compliance Bureau.

<sup>G</sup> The final three sentences of ¶ 10 of the Findings of Fact were added to address complainant's objections to the PDO with regard to the positions held by Prochaska and Hook.

<sup>I</sup> In his post-hearing reply brief, complainant attempted to show there was a salary differential by referring to certain parts of the collective bargaining agreement. However, these parts of the agreement

connection with progression), the work being performed by the Revenue Auditors was more advanced and challenging, and thus more desirable to an accountant like complainant.

12. Respondent's personnel unit completed the paperwork to reassign complainant's position to the Vehicle Review Unit on October 25, 1996, with an effective date of October 13, 1996 (Respondent's Exhibit 2).<sup>h</sup>

13. Between October of 1996 and July of 1997, complainant expressed an interest in being a Revenue Auditor in Office Audit Unit K in conversations with supervisors Greg Frazier and Dan Davis. Neither these supervisors nor anyone else in management ever informed complainant that there were vacancies in Revenue Auditor positions in Office Audit Unit K to which complainant would have been eligible for transfer at that time. Complainant was informed that in order to pursue a permissive transfer to a vacant position, he needed to submit a letter of interest and resume. Complainant did not submit the paperwork required for a permissive transfer until March 30, 1998.<sup>l</sup>

14. Between October of 1996 and July of 1997, there were no vacancies in any positions in Office Audit Unit K to which complainant was eligible to transfer

15. Some time between January and March 1998,<sup>l</sup> the position of a Revenue Auditor 4 (Elaine Larson) from a different audit unit was reassigned to Office Audit Unit K. This was a reassignment of a filled position, not an appointment to a vacant position, and it was not a transfer. Revenue Auditor 4 is in a different pay range from complainant's Revenue Agent 3 classification. Revenue Auditor 1, 2, and 3, comprise a progression series<sup>2</sup>, but movement to Revenue Agent 4 from Revenue Agent 3 requires promotion, and complainant could not have qualified for a permissive transfer to that position even if it had been vacant.

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were not part of the record (respondent put an excerpt from the agreement related to transfers in the record as an exhibit) and they cannot be used as evidence.

<sup>h</sup> Complainant contended in objections he filed to the PDO that his transfer could not have occurred until January 1997, when the reorganization received final approval. There is nothing in the record to support his assertion. Paragraph 12 was amended to include the transaction effective date and the exhibit relied upon for the finding.

<sup>l</sup> The final sentence of ¶ 13 was added for clarification.

<sup>j</sup> The dates were corrected to accurately reflect the record.

<sup>2</sup> See §ER 1.02(32), Wis. Adm. Code.

16. Pursuant to DOR policy, to have been considered for a permissive transfer, complainant would have had to submit a written letter of interest in a vacant position and a resume, and he was advised of this by management. As set forth above, there were no vacant positions during the relevant time period to which complainant could have transferred, and complainant never submitted a letter of interest and a resume. He submitted a contractual transfer request (Respondent's Exhibit 6) to the DOR personnel office on June 10, 1997 Pursuant to the contract (Respondent's Exhibit 3 consists of a relevant segment) and DOR policy, and as respondent explained to complainant, a contractual transfer would have been appropriate only to another Revenue Agent 3 position.<sup>K</sup>

17 No member of management who would have had a role in denying complainant a permissive transfer to Office Audit Unit K was either aware of complainant's disability or perceived complainant as disabled.

#### CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden of proof to establish by a preponderance of the credible evidence that respondent discriminated against him as alleged.
3. Complainant has not sustained his burden of proof.
4. Respondent did not discriminate against complainant on the basis of disability by failing to rehire him on a permissive transfer basis into a Revenue Auditor position in Office Audit Unit K between October 1996 and July 1997

#### OPINION<sup>L</sup>

Under the Wisconsin Fair Employment Act (WFEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this bur-

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<sup>K</sup> The last two sentences of ¶1 6 in the PDO repeated other findings and, accordingly, were deleted to avoid repetition.

<sup>L</sup> Changes were made to the Opinion section to reflect the rationale of the majority on the question of whether complainant established that he was a person with a disability. Other changes were made to

den the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

As noted above, the only issue before the Commission involves complainant's allegation that respondent discriminated against him on the basis of disability when it failed to rehire him on a permissive transfer basis into a Revenue Auditor position in the Office Audit Unit K between October of 1996 and July of 1997

In a charge of discrimination on the basis of failure to hire, a prima facie case is usually established by a showing that 1) complainant has a status protected by the WFEA, 2) that he applied and was qualified for a job for which the respondent was seeking applicants, 3) that despite his qualifications, he was rejected by the respondent, and 4) that the respondent continued to seek applicants, or hired someone not of the same protected group as complainant. *Id.*, 411 U. S. at 802.

In order to establish a prima facie case of discrimination of this nature, complainant first must show he is an " individual with a disability" pursuant to §111.32(8), Stats., which provides:

- (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;
  - (c) Is perceived as having such an impairment.

Complainant testified that his depression had a negative emotional effect and made it very difficult for him to concentrate on certain tasks including work tasks. The medical evidence of record supports a conclusion that complainant suffered from depression at times but not on a continual basis. There is no medical documentation supporting complainant's assertion that depression made it difficult for him to concentrate. Nor is there medical evidence that

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reflect the Commission's rationale, to address complainant's objections to the Proposed Decision and Order, and for clarification.

his depression interfered with his ability to perform his job tasks. To the contrary, Dr Hummel's examination in the summer of 1996, found no signs of depression and no mental disability which would prevent him from performing the essential functions of his job. (See Finding of Fact 7, above)

The Commission is presented with the threshold question of whether complainant is required to present medical evidence to substantiate the existence of his symptoms and their impact on his life activities and his work in order to establish the existence of a disability. In *Wal-Mart Stores v. LIRC*, 200 WI App 272, 240 Wis. 2d 209, 621 N. W 2d 633, review denied, 2001 WI 15, an employee was discharged following an emotional outburst at work which LIRC attributed to a psychiatric condition (obsessive-compulsive disorder [OCD]). There was no expert testimony in the record that the employee's OCD caused him to have this outburst. The Court held that such testimony was required:

The Supreme Court has explained there is a distinction "between matters of common knowledge and those needing expert testimony to explain. Expert testimony should be adduced concerning matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience." In situations where the factual question of causation is "so complex or technical" that a lay fact finder "without the assistance of expert testimony would be speculating," the absence of expert testimony "constitutes an insufficiency of proof." We conclude that this is precisely the circumstance regarding the question before us. 2000 WI App. 272, ¶ 16 (citations omitted)

The Court went on with the following discussion:

The pamphlet introduced by Schneider [the employee] states that "OCD is a complex and baffling medical illness," and that "[d]uring the past decade, scientific research has made enormous progress in understanding the biochemical features of OCD, and doctors and other mental health professionals are now able to diagnose and treat the illness." Schneider himself testified that OCD "is a very much misunderstood disease still at this date and time." We agree. There is nothing in the record from which we might conclude that the symptoms and manifestations of OCD are "within the realm of the ordinary experience of mankind." We thus conclude that the question of whether Schneider's OCD caused him to react angrily and vociferously to the news that he had been passed over for promotion, and thereby to commit the alleged insubordination for which he was fired, is sufficiently "complex or technical" that a lay fact finder



"without the assistance of expert testimony would be speculating" on the matter *Id.* at ¶17 (Citations omitted.)

The Commission finds that complainant's assertions that his depression affected his ability to concentrate and to perform the essential functions of his job required supporting medical opinion evidence especially here where the medical evidence of record does not support complainant's assertions. In short, complainant has not shown that he is an individual with a disability, within the meaning of §111.32(8), Stats. As discussed below, the outcome of this case would be the same even if complainant had established that he is an individual with a disability.

The second element of a prima facie case is that complainant applied and was qualified for a job for which the respondent was seeking applicants.

Complainant advances the following argument with regard to one position:

The Department of Revenue increased the number of Revenue Auditors in Office Audit Unit K in 1997. Sometime in 1997 Elaine Larson started working in Office Audit Unit K.<sup>M</sup> The effect of this appointment was to increase by one auditor the number of Revenue Auditors in Office Audit Unit K. The Department of Revenue could have appointed me as a "Permissive Transfer" instead of appointing Elaine Larson to a Revenue Auditor 3 position in Office Audit Unit K. Complainant's post-hearing letter brief, p. 2.

The record reflects that at no point during the relevant time period did respondent seek applicants for this position. Even accepting complainant's argument that this element of a prima facie case could be satisfied if a vacant position existed to which respondent could have appointed complainant through transfer or otherwise, the record reflects that this was a reassignment of a filled position, not a transfer. Respondent could not possibly have appointed complainant to this position as long as Ms. Larson remained in it. In addition, this position was at the Revenue Auditor 4 level which is in a different pay range than the position complainant held, and he would not have been eligible for a transfer to this position.

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<sup>M</sup> Complainant incorrectly references 1997 here. The subject position was reassigned to Office Audit Unit K in 1998. (See Finding of Fact 15, above)

With regard to the Revenue Agent position that had previously been filled by Ann LaForce (See Finding of Fact 9, above), the record reflects that respondent neither filled this position, initiated any action to fill it, nor had any intention of filling it, during the time period in question. The civil service code defines a "vacancy" as "a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill that position." §ER-MRS 1.02(34), Wis. Adm. Code. Even though the LaForce position satisfied this definition of "vacancy," the record does not show that respondent sought applicants for this vacant position during the relevant time period. Moreover, as discussed below, the record does not show that respondent was required to fill this position, or would reasonably have been expected to fill this position, during the relevant time period.

Arguably, complainant would have had a right to appointment to the LaForce position either *if* the agency had been facing a possible layoff and *if* complainant had the right to voluntarily demote or transfer to a position at that classification, or *if* he had restoration rights to a Revenue Agent 4 position as the result of having been laid off. *See Givens v. DILHR*, 87-0039-PC-ER, 3/10/88. However, complainant was a Revenue Agent 3, and therefore not eligible to have transferred or voluntarily demoted to the Revenue Agent 4 position, and there was no layoff situation facing respondent. The Commission does not agree with complainant's assertion that, essentially, this is immaterial because respondent conceivably could have rewritten the position description and filled it at a lower level Revenue Agent. The bare possibility that this could have occurred does not take this scenario out of the realm of the hypothetical and into the realm of an actual decision to deny complainant a transfer to this position.

Complainant has also failed to show that respondent would reasonably have been expected to fill the LaForce position during the relevant time period but did not do so in order to discriminate against him. The record reflects that respondent ultimately did fill this position at the Revenue Auditor 1 level in January 1998. The filling of this position was consistent with Frazier's normal practice of hiring a "class of such employees after the accumulation of a number of vacancies, which usually occurred approximately annually." Moreover, it should be noted here that January of 1998 was both outside the relevant time period and prior to the

time (March 30, 1998) when complainant submitted a resume and a letter of interest, which was a prerequisite for consideration for permissive transfer

Finally in this regard, this is a case of disparate treatment discrimination on the basis of disability, and no discrimination could have occurred unless respondent deliberately discriminated against complainant. *Racine Unified School District v. LIRC*, 164 Wis. 2d 567, 595, 476 N. W. 2d 707 (Ct. App. 1997) ("a complainant asserting a disparate treatment theory must prove discriminatory intent to prevail.") There is no indication in the record that during the relevant time frame respondent ever intentionally deprived complainant of an opportunity to compete for or to be appointed to the LaForce position.

Another element in a prima facie case of discrimination on the basis of disability is either knowledge by the relevant members of management that complainant was disabled, or a perception that complainant was disabled. *Olmanson v. UWGB*, 98-0057-PC-ER, 10/21/98. A member of management can not very well discriminate against someone on the basis of his or her disability unless the manager is aware of a disability, or perceives the employee to be disabled. Complainant never established this. In this regard, it is noteworthy that Dr. Hummel's report was disseminated only to the administrator of the Income, Sales, and Excise Tax Division and the Director of the Human Resources Bureau, neither of whom played any role in the subject matter of this complaint. Complainant argues that the questions management asked Hummel--e. g., whether complainant was disabled--show that management believed that he was disabled. This does not show that respondent believed complainant was disabled. Rather, management was making inquiry in connection with the complaint it had received regarding complainant's actions toward a co-employee (see Findings of Fact 2 and 3) which led to his 3 day suspension, and management was trying to find out whether or not complainant had a disability which affected his activities. Also, while complainant submitted a disability self-identification form (Respondent's Exhibit 4) in August 1997, he did not identify a specific disability and did not identify a requested accommodation. Complainant did not submit a form identifying his disability as depression, and requesting a specific accommodation (Respondent's Exhibit 8, p.3), until February 23, 1998, which was outside the relevant time period.

Furthermore, even if it were assumed that complainant had established a prima facie case, complainant has failed to establish pretext. That is, assuming a prima facie case, respondent's rationale for not transferring complainant is that, in management's opinion, there was no real vacancy to fill until they decided, consistent with their normal staffing process, to hire a new class of auditors in January 1998, which was after the relevant time period and prior to complainant having submitted a resume and letter of interest. There is little or no evidence that this was not respondent's belief or that this was somehow a pretext for denying complainant a transfer because of his disability.

Complainant argues in his reply brief that he was denied an accommodation. As discussed above, complainant never identified a specific accommodation needed during the relevant time period, and there is no competent evidence in the record, such as an opinion by a health care professional, that complainant needed an accommodation with regard to his disability.

Finally, complainant raises a procedural issue concerning the Commission's refusal to compel the attendance of certain witnesses, and the denial of his request for postponement of the hearing. The day before the hearing, complainant filed a request to have three DOR employees produced as witnesses the next day--James Haugen, Vicki Siekert, and Cate Zeuske (the DOR Secretary). The file reflects that the examiner discussed this request in a conference on September 20, 2000, the day before the hearing, and denied the request due to lack of notice, and because complainant would need to provide some kind of showing of necessity before the Commission would subpoena the DOR Secretary. The file also reflects that:

(1) The prehearing conference report dated March 2, 2000, explicitly alerted complainant to the fact that he needed to file and exchange his list of witnesses at least three working days before the hearing, pursuant to §PC 4.02, Wis. Adm. Code, and that the Commission requested at least two weeks advance notice for issuing letters of appearance and subpoenas;

(2) The parties apparently discussed the appearance of witnesses at hearing at this prehearing conference since the conference report reflects that respondent identified Terry Wille as a potential hearing witness;

(3) On September 14, 2000, respondent filed with the Commission and with complainant its list of potential hearing witnesses and copies of documents it intended to offer as hearing exhibits;

(4) On September 18, 2000, complainant filed with the Commission and with respondent a letter identifying himself as a witness for the September 21, 2000, hearing, and filed copies of documents he intended to offer as hearing exhibits; and

(5) Complainant did not indicate in writing his intent to include James Haugen, Vicki Siekert, or Cate Zeuske on his witness list until September 21, 2000, the day of hearing.

This information demonstrates that complainant was aware or should have been aware of the process for requesting the appearance of hearing witnesses, and of the requirement for providing notice prior to hearing of the identity of potential witnesses, but failed to follow either or to provide any reason for this failure. Instead, he waited until the day before hearing, instead of two weeks before hearing, to request that the Commission compel the attendance of Haugen, Siekert, or Zeuske; and until the day of hearing, rather than at least three working days prior to hearing as required by administrative rule, to provide written notice that these three individuals should be added to his hearing witness list. The fact that complainant waited until the day before hearing to present his request that Haugen, Siekert, or Zeuske be produced as witnesses, as well as the fact that complainant failed to offer any explanation for this 11<sup>th</sup>-hour request, supports the conclusion reached here that the hearing examiner properly denied this request. In addition, complainant now argues that he complied with §PC 4.02, Wis. Adm. Code, which requires notice of witnesses at least three working days before the hearing. However, complainant's letter of September 14, 2000, identifying these three persons as witnesses, "in addition to the request previously made for witnesses," was not filed with the Commission until September 21, 2000, the day of the hearing.

While the Commission has considered all complainant's contentions, it has addressed only the more significant ones. In this regard, it is noted that a number of complainant's arguments concern matters that are outside the scope of the issue for hearing.

ORDER

The Commission having determined that respondent did not discriminate against complainant as alleged, this complaint is dismissed.

Dated: October 15, 2001

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/JMR:970152Cdec2.1

  
JUDY M. ROGERS, Commissioner

CONCURRING OPINION

I agree with all parts of this decision with the exception of the majority's conclusion that complainant did not show that he is an individual with a disability within the meaning of s. 111.32(8), Stats.

In the instant case, the complainant's medical records reflect that he was diagnosed with depression and accompanying insomnia in 1994. He was being treated with Prozac, Xanax and Trazodone. (Complainant's Exhibits 1 and 2). He also was seen in 1997, and diagnosed with depression and accompanying insomnia. His progress record dated April 28, 1997, shows that he was taking Zoloft and "gave a general description of not feeling well but apart from some headaches or some back pain, this is very nonspecific. He does play basketball but does not have a lot of enthusiasm about anything and cannot sleep unless he takes lorazepam." Complainant's Exhibit 4. He was next seen on May 14, 1997. At that time he was started on Amitriptyline, continued on Zoloft, and taken off Lorazepam. He was to be seen again in a month. A May 30, 1997, progress note (Complainant's Exhibit 3) includes discussion of his sleep problems in the context of the drugs he had used or was using. He complained that the Amitriptyline did not help him sleep, the Zoloft made him jittery in the morning, and the Lorazepam, which he had resumed, wasn't working well either. He "did agree that he had no 'totally sleepless nights,' but he does not fall asleep as quickly as he would like." The doctor noted that complainant "looked depressed, not maintaining good eye contact and looking somewhat morose at times." After further discussion of complainant's

drug regimen, the report includes the doctor's observations that "My goal would be to have him take as few medications as possible and still treat the depression and its symptoms. He continues to have counseling with Sven Midelfort." (Complainant's Exhibit 3) At the hearing, which I held as hearing examiner, complainant testified that his depression caused insomnia and persistent feelings of sadness and unhappiness, and made it very difficult for him to concentrate on certain tasks.

In my opinion, this record establishes that complainant was suffering from depression, and that this was "a physical or mental impairment" under s. 111.32(8), Stats. However, the majority goes on to state that

There is no medical documentation supporting complainant's assertion that depression made it difficult for him to concentrate. Nor is there medical evidence that his depression interfered with his ability to perform job tasks. To the contrary, Dr Hummel's examination in the summer of 1996, found no signs of depression and no mental disability which would prevent him from performing the essential functions of his job. (See Finding of Fact 7, above)

The Commission is presented with the threshold question of whether complainant is required to present medical evidence to substantiate the existence of his symptoms and their impact on his life activities and his work in order to establish the existence of a disability. Majority opinion, pp. 7-8.

The majority then cites this language from *Wal-Mart Stores v. LIRC*, 200 WI App 272, 240 Wis. 2d 209, 621 N. W. 2d 633, review denied, 2001 WI 15:

The Supreme Court has explained there is a distinction "between matters of common knowledge and those needing expert testimony to explain. Expert testimony should be adduced concerning matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience." In situations where the factual question of causation is "so complex or technical" that a lay fact finder "without the assistance of expert testimony would be speculating," the absence of expert testimony "constitutes an insufficiency of proof." We conclude that this is precisely the circumstance regarding the question before us. 2000 WI App. 272, ¶ 16 (citations omitted)

In *Wal-Mart Stores*, the Court held that the "question of whether [the employee's] OCD [obsessive compulsive disorder] caused him to react angrily and vociferously to the news that he had been passed over for promotion, and thereby to commit the alleged insubordination for

which he was fired, is sufficiently 'complex or technical' that a lay fact finder 'without the assistance of expert testimony would be speculating' on the matter " *Id.*

The question of whether a particular subject is so complex or technical that a lay fact finder would be speculating in resolving that question without the benefit of expert testimony involves a judgment call. The issue before this Commission comes down to whether complainant's testimony that his documented depression caused him insomnia and persistent feelings of sadness and unhappiness and made it difficult to concentrate on certain tasks involves a question that is so complex or technical that a lay fact finder like the Commission would be speculating to resolve it without the benefit of expert testimony.

Dr. Hummel's report supports the respondent's case in some respects. However, Dr. Hummel did not directly address the question of whether complainant had a disability. He responded to the question of "Does Mr. Ganther have a mental disability? If so, does this disability prevent him from performing any of the essential functions of his job?" with this answer: "Mr. Ganther has personality characteristics and current functioning which would result in a diagnosable condition, using the Diagnostic and Statistical Manual-IV. However, he does not have a mental disability which would *prevent him from performing the essential functions of his job* give the position description I reviewed." (Respondent's Exhibit 9, p. 8) (emphasis added) This does not directly address the statutory definition of "individual with a disability," s. 111.32(8), Stats., because the statute does not require inability to perform the essential functions of the job; it only requires that the individual have a "physical or mental impairment which makes achievement unusually difficult or limits the capacity to work." S. 111.32(8)(a), Stats. Dr. Hummel answered the question "If Mr. Ganther is disabled, what are reasonable accommodations so that he can perform the essential functions of his job?" with this answer: "The problems Mr. Ganther will have performing his job *whether or not he has a disability* is acting appropriately with female co-workers when he has a social interest in them and they do not share his interest or make him frustrated or angry." (Respondent's Exhibit 9, p. 8) (emphasis added) In this context, Dr. Hummel's statement in the summary portion that "Mr. Ganther does not have a mental disorder which would make him disabled or unable to



perform his job duties,” *id.*, p. 7, cannot be assumed to have been addressing the statutory definition of an individual with a disability.

In my opinion, the part of Dr Hummel’s report which lends the most significant support to the respondent’s position is the statement in the section on “Personality Characteristics” that “Mr Ganther’s personality profile does not indicate current signs of active depression or anxiety.” *Id.*, p.5. However, this must be considered in the context of other statements in the report discussed above, as well as Dr Hummel’s statement that “Mr. Ganther is in need of psychological treatment.” *Id.*, p. 8. I believe that a preponderance of the evidence supports the proposed finding that complainant is a person with a disability as defined in the WFEA.

Related to this is the conclusion that on this record complainant does not need more specific expert testimony “to substantiate the existence of his symptoms and their impact on his life activities and his work to establish the existence of a disability,” majority opinion, p. 8. To begin with, there are comments in complainant’s medical records which are consistent with his testimony regarding his symptoms and their effects. These records reflect that complainant was suffering from depression with accompanying insomnia, that he was being treated with medications, and that he “looked depressed and somewhat morose.” (Complainant’s Exhibit 3) This evidence supports complainant’s testimony that his depression caused insomnia and persistent feelings of sadness and unhappiness, and made it very difficult for him to concentrate on certain tasks. In my opinion, the medical evidence combined with complainant’s own testimony supports conclusions by this Commission that complainant’s symptoms and their effect on him were as he testified, and that his status was that of an “individual with a disability” as defined by the WFEA, s. 111.32(8), Stats., and that as laypersons the Commission can reach these conclusions on this record, and without the benefit of additional expert testimony, without engaging in “speculation.”

As indicated above, the question of whether a particular issue of causation “is ‘so complex or technical’ that a lay fact finder ‘without the assistance of expert testimony would be speculating,’ 2000 WI App 272, ¶16, involves a judgment call. In reaching its conclusion under the particular facts of *Wal-Mart Stores*, the Court relied on information in the record that

established that OCD “is a complex and baffling mental illness,” *id.*, ¶and that OCD “is a very much misunderstood disease at this date and time.” *Id.* I do not think that an issue involving the interrelationship of depression, insomnia, feeling sad and unhappy, and difficulty with concentration, is that unusual or arcane that it requires more expert opinion evidence than is present in this case to support a reasonable, non-speculative finding. *See Weiss v. United Fire and Casualty Co.*, 197 Wis. 2d 365, 541 N. W. 2d 753 (1995):

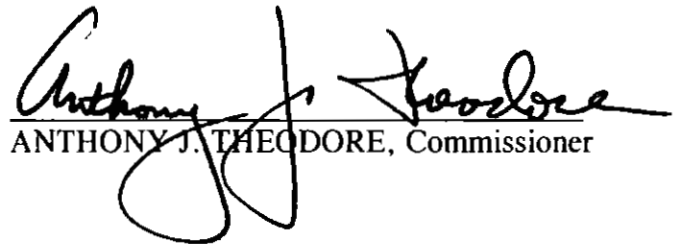
[R]equiring expert testimony rather than simply permitting it represents an extraordinary step, one to be taken only when “unusually complex or esoteric issues are before the jury.” Before expert testimony is required the circuit court must find that the matter involve is “not within the realm of the ordinary experience of mankind.”

Thus, for example, we have required expert testimony in many cases involving medicine, precisely because medical practice demands “special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience.”

Even in the medical realm, however, courts have limited the application of a requirement of expert testimony to those matters outside the common knowledge and ordinary experience of an average juror.

Thus “whether expert testimony is required in a given situation must be answered on a case-by-case basis.” 197 Wis. 2d at 379-381. (citations and footnotes omitted)

In this case, I believe the findings in the proposed decision concerning complainant's mental status and its effects are supported by common experience and reasonable inferences that can be drawn from the medical records in evidence.



ANTHONY J. THEODORE, 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