STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID J. LUTZE,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION
Respondent.

Case No. 97-0191-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint of discrimination under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.). In a ruling entered on July 28, 1999, the Commission established the following issue for hearing: "Whether respondent discriminated against complainant on the basis of disability when his performance was evaluated unsatisfactory for the period from August 1996 to June of 1997 "[1] In an interim decision and order entered on August 28, 2000, the Commission reached substantive conclusions on the merits of this case, but left this proceeding open for determination of the final remedy including the issue of attorney's fees and costs. The parties have been unable to reach agreement on fees and costs, but agreed to submit this issue for decision by the Commission on the basis of written submissions.

Complainant asks for fees and costs in the amount of $8732.12. Respondent does not challenge the reasonableness of the attorney's fees, but argues that they should be reduced because complainant achieved only partial success on the merits, and because complainant rejected an offer of settlement that would have been more advantageous monetarily than the remedy the Commission can award (essentially limited to a cease and desist order). Respondent also objects to complainant's claim for copying costs on the ground that copy costs are not an allowable expense item in general.

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[1] The Commission in so doing also denied respondent's motion to dismiss for failure to state a claim on the ground that there was no adverse employment action involved in this case.

As noted above, the issue for hearing was: "Whether respondent discriminated against complainant on the basis of disability when his performance was evaluated unsatisfactory for the period from August 1996 to June of 1997 " In its interim decision the Commission concluded that the performance evaluation in question had been partially motivated by complainant's disability and partially motivated by legitimate performance issues—i. e., there was a "mixed motive." *See Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N W 2d 234 (Ct. App. 1994): "if an employe is terminated in part because of an impermissible factor and in part because of other motivating factors, *and* the termination would have taken place in the absence of the impermissible motivating factor, the employe should be awarded only a cease and desist order and attorney's fees." (citations omitted) Respondent in effect argues that complainant's fees and costs should be reduced to reflect the fact that complainant did not establish that the unsatisfactory performance evaluation was 100% attributable to his disability. In the Commission's opinion, under all the circumstances, such a reduction is not appropriate.

In *Thomas v. DOC,* 91-0161-PC-ER, 4/30/93, the Commission addressed a similar issue as follows:

> In order to be a prevailing party, a complainant does not have to prevail on every issue that arises in the proceedings, but still must achieve substantial success, *see Radford v. JJB Enterprises Ltd,* 163 Wis. 2d 534, 550, 472 N W 2d 790 (Ct. App. 1991) ("the losing party is not entitled to a reduction in attorney's fees for time spent on unsuccessful claims, if the winning party achieved *substantial success* and the unsuccessful claims were bought and pursued in good faith." (emphasis added; citations omitted)). In *Radford,* the Court of Appeals adopted the approach followed by the U. S. Supreme Court in *Hensley v. Eckerheart,* 461 U. S. 424, 435, 76 L. Ed. 2d 40, 51-52, 103 S. Ct. 1933 (1983). In *Racine v. Unified School District v. LIRC,* 164 Wis. 2d 567, 609, 476 N W 2d 707 (Ct. App. 1991) the Court quoted the following language from *Hensley:*
>
> > Many civil rights cases will present only a single claim. In other cases the plaintiff's claim for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the court should focus on the significance of the overall relief obtained by the plaintiff in

> relation to the hours reasonably expended on the litigation. Where a plaintiff had obtained excellent results the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit *The result is what matters* . *Id.*, pp. 15-16.

In the instant case, the complainant established that the performance evaluation in question was tainted by unlawful discrimination, although there was a partial legitimate basis for it. The respondent satisfied its affirmative burden of proof under *Hoell v. LIRC* to show that the action would have occurred in the absence of the discrimination. Thus the complainant is not entitled to the remedies of the expunging of the performance evaluation or the recovery of the salary diminution attributable to that performance evaluation. However, the complainant prevailed on the core issue raised by his complaint—"whether respondent discriminated against complainant on the basis of disability when his performance was evaluated unsatisfactory "[2] The evidence running to this issue was inextricably blended with the evidence running to the question of whether a mixed motive was present and whether respondent would have issued the same evaluation in the absence of a discriminatory intent. There is no realistic way that complainant's attorney's time or the litigation costs could be attributed to different sub-issues in this case. A full award also is indicated by well-established policy factors. The Supreme Court has established that in pursuing his claim, complainant was operating as a "private attorney general:"

> The Wisconsin Supreme Court has expressly held that reasonable attorney's fees may be awarded to the victor in an action under the WFEA because "a complainant who files a complaint under the Fair Employment Act is acting as 'a private attorney general' to implement a public policy that the legislature considered to be of major importance." *Racine Unified School Dist. v. LIRC,* 164 Wis. 2d at 611

Respondent also argues that complainant achieved only partial success with regard to certain issues which dropped out of this case due to preliminary rulings by the Commission prior to the hearing on the merits. Respondent points out that the Commission investigation resulted in an initial determination (October 12, 1998) that there was no probable cause to

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[2] This is the issue for hearing the Commission established in its July 28, 1999, ruling.

believe complainant had been discriminated against with regard to the claims he raised in his complaint related to respondent counseling him regarding his failure to record personal mileage, and respondent's alleged failure to accommodate. However, complainant was unrepresented by counsel until sometime on or after October 30, 1998, and there was no appeal of the "no probable cause" determinations.

Respondent also points out that in a ruling on a motion to dismiss (July 28, 1999), the Commission granted respondent's motion in certain respects:

> In his brief on the motion, complainant appears to assert that the removal of supervisory duties from his position and the conduct of investigatory interviews relating to his personal use of a state vehicle remain a part of this action. It should first be noted in this regard that complainant, who appeared by counsel, agreed to the statement of issue for hearing (See finding #3, above) which does not refer to either of these actions. Aside from this, however, there are additional reasons not to consider these allegations further in this proceeding. It is apparent from the Initial Determination that the investigator did not interpret complainant's mention of the removal of supervisory duties in his complaint as a separate allegation of discrimination. Both in his complaint and in his brief on the motion, complainant indicates that this removal took place on or before February 3, 1997, and he was notified of the removal on or before February 3, 1997 The FEA requires that a complaint be filed within 300 days of the date that the discrimination allegedly occurred. Section 111.39(1), Stats. Since it is acknowledged by complainant that the discrimination took place on or before February 3, 1997, which is more than 300 days prior to December 1, 1997, the date this complaint was filed, this allegation was untimely filed. It should also be noted that the removal of supervisory duties is a discrete employment action and not subject to application of a continuing violation theory The investigatory interview and resulting counseling were the subject of Conclusion #2 in the Initial Determination (See finding #1, above). The investigator found No Probable Cause in this Conclusion and complainant failed to appeal this determination. It is concluded that the motion to dismiss for untimely filing of the allegation relating to the removal of supervisory duties should be granted; and that it would be inappropriate to consider the allegation relating to the investigatory interview and resulting counseling further in these proceedings.
>
> Finally, respondent argues in this motion that the only protected fair employment activity cited by complainant is his support of a worker's compensation claim filed by another employee, and that this is not one of the protected activities cited in §111.322, Stats. This statutory section contains a lengthy list of protected fair employment activities and support of a worker's compensation claim or the filing of a worker's compensation claim is not on this

> list. Moreover, complainant has cited no other protected fair employment activity in which the complainant engaged, nor any authority for regarding support of another employee's worker's compensation claim or filing of such a claim as a protected fair employment activity. It is concluded as a result that the motion to dismiss for failure to state a claim should be granted as to this issue. *Id.*, pp.5-6.

The motion to dismiss was decided on briefs. The Commission has perused complainant's brief in opposition to respondent's motion to dismiss, filed April 28, 1999. The bulk of the brief goes toward contesting respondent's main contention that the negative performance evaluation was not an adverse employment action, a contention the Commission rejected. As the Commission indicated in its interim decision quoted above, complainant's attorney had stipulated to a statement of issues that did not involve the removal of supervisory duties and the conduct of investigative interviews with regard to complainant's personal use of a state vehicle. The latter issues were covered in complainant's brief only to the extent that those transactions were mentioned in his recitation of the factual background of this case, and the Commission perhaps addressed them in an excess of caution.[3] Complainant's brief also did not address the question of retaliation. Complainant's attorney billed him for two and one-half hours for preparing the brief. In the Commission's opinion, after counsel appeared for complainant in this proceeding, the claims rejected by the Commission were a minor part of this case. The amount of time that could be attributed to the claims rejected by the Commission was no more than *de minimis*. This case is substantially different from the cases cited by respondent[4], which involved situations where the complainants failed to prevail on much more significant parts of their claims, and the Commission declines to reduce the fee award on the basis of partial success.

Respondent also argues that complainant's fee award should be reduced because in April, 1998, complainant rejected respondent's offer to settle this case by payment of $1248, the amount of salary he had lost because of his unsatisfactory evaluation. Complainant

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[3] "In his brief on the motion [to dismiss], complainant *appears* to assert that the removal of supervisory duties from his position and the conduct of investigatory interviews relating to his personal use of a state vehicle remain a part of this action." (emphasis added) (Ruling on motion to dismiss, p. 5)

[4] *Hagmann v. UWEC*, 96-0044-PC-ER, 4/25/00; *Jones v. Dy-Dee Wash* (LILRC, 11/4/88).

declined to settle the case without having the evaluation changed. In the Commission's opinion, this does not provide a basis for reducing complainant's allowable fees and costs. To begin with, complainant rejected this offer prior to his retaining counsel. Also, the lost salary involved in this case was not the only thing complainant was seeking, and arguably was a less significant factor than the core issue concerning whether respondent had discriminated against him. Complainant certainly had an interest in pursuing this case above and beyond lost salary *per se. See, e. g., Watkins v. LIRC,* 117 Wis. 2d 753, 345 N. W 2d 482 (1984). Also, the *Watkins* Court noted in its discussion of the issue of whether the WFEA should be interpreted to provide for attorneys fees that a successful complainant acted as a "private attorney general" and should be encouraged to that end. 117 Wis. 2d at 764. The complainant in this case should not be penalized because he refused to accept a cash offer to compensate him for his lost salary, but which did not address his interest in pursuing the question raised by the core issue.

The final issue concerns respondent's objection to the $736.82 complainant claims for the cost of copies. Copy costs are not an allowable item of costs in proceedings of this nature. *Staples v. SPD,* 95-0189-PC-ER, 11/3/99. However, complainant's attorney points out that part of the claimed copy costs are attributable to making copies for the Commission and respondent's counsel of a 204 page informal hearing transcript she had prepared in-house, and which was used by both parties and the Commission during this proceeding. In the Commission's opinion, the cost incurred by complainant for making a copy of this transcript for use by respondent's counsel is not simply a copy cost incurred by complainant in his litigation of this matter, and accordingly $20.40 (204 pages x $.10 per page) of the total of $736.82 will be allowed.

In conclusion on this issue, the Commission will award the complainant $8006.70 in fees and costs. This represents $8732.12 claimed by complainant, minus the $736.82 attributable to copy costs except for $20.40 representing copying performed for respondent's benefit.

ORDER

1 The attached interim decision and order dated August 28, 2000, is finalized as the Commission's final disposition of this matter. The Commission has corrected some typographical errors.

2. Respondent is ordered to cease and desist from further discriminating against the complainant because of his carpal tunnel syndrome with respect to his performance evaluations.

3. Respondent is ordered to pay complainant $8006.70 as his allowable fees and costs.

Dated: February 23, 2001. STATE PERSONNEL COMMISSION

Laurie R McCallum/jm
LAURIE R. McCALLUM, Chairperson

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Judy M Rogers
JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds

for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95

STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID J. LUTZE,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 97-0191-PC-ER

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint of discrimination under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.). In a ruling entered on July 28, 1999, the Commission established the following issue for hearing: "Whether respondent discriminated against complainant on the basis of disability when his performance was evaluated unsatisfactory for the period from August 1996 to June of 1997 "[1]

FINDINGS OF FACT

1. At all times relevant to this matter, complainant has been employed as a supervisor with the DSP (Division of State Patrol), District 4.[2]

2. Complainant's annual performance evaluations for the periods beginning October 9, 1988 (the date of his promotion to a supervisory position)-January 9, 1989, through May 1, 1995-November 26, 1995, were entered into the record as Complainant's Exhibit P1. All of these evaluations were at least satisfactory or better The last five of these evaluations were completed while complainant was under the immediate supervision of then Lt. Terry Bengtson.[3]

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[1] The Commission in so doing also denied respondent's motion to dismiss on the ground that there was no adverse employment action involved in this case.

[2] Subsequent to the performance evaluation here at issue, complainant voluntarily demoted to a position classified as trooper.

[3] He subsequently was promoted to Captain/District Commander.

3. Complainant's performance evaluation for the reporting period of May 1, 1995, through November 26, 1995, was the last evaluation performed by Lt. Bengtson. This evaluation rated complainant as essentially satisfactory. Some of the statements in the Results section as well as in the Performance Summary indicated not just that complainant had met the standard but that he had exceeded it. The following statement appeared in the Results section in relation to complainant's responsibilities for the VASCAR speed computer program:

> You do need to take a more positive stand with some of your peer group on the equipment and who should be issued the equipment and recommendations on justifications to retain the equipment.

The following statement appeared in the Performance Summary in relation to complainant's supervision of individual troop members:

> You need to take a more positive stand on changes to the schedule after it is published. The changes need to address the district operational needs as well as personal needs of the troopers. . . . You have continued to work on open communications with your work unit. This has shown improvement. Please continue to work on this issue. It will greatly benefit you in the future.

4. Complainant's performance evaluation for the reporting period of November 26, 1995, through August 26, 1996, was completed by Lt. Douglas Notbohm[4] as complainant's first line supervisor. Lt. Notbohm had succeeded Lt. Bengtson. Capt. Bengtson also signed the evaluation in his new capacity. Some of the statements in the Results section as well as in the Performance Summary indicated not just that complainant had met the standard but that he had exceeded it. The following statement appeared in the Results section in relation to complainant's goal of working with personnel to increase involvement in motor carrier enforcement and school bus spot checks: "Continued efforts needed, but goal will be met with continued efforts." The following statement appeared in the Performance Summary in relation to complainant's supervision of individual troop members:

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[4] A January 21, 1997, email from Lt. Notbohm (Complainant's Exhibit 21) which was prepared after Lt. Frenette took over as complainant's immediate supervisor, and which was written in response to an email from Lt. Frenette to Lt. Notbohm raising some issues about complainant's handling of the evidence room, had a favorable comment by Lt. Notbohm regarding complainant's performance. This favorable comment was deleted with a felt tip pen by an agent of respondent whose identity is unknown.

> You have made positive improvement in the area of dealing with requests for schedule changes from your subordinates. With continued emphasis on balancing operational needs with employee requests, you will further improve your decision making in this area. You have shown the willingness to take action and to hold your personnel accountable for their actions if improvements are needed and to offer praise when appropriate. You have made a noticeable effort to increase your time in the field working with your troop members and these efforts must continue in the future.

The following statement appeared in the Performance Summary in relation to complainant's monitoring and direction of district employees as duty sergeant: "You have improved in the area of providing decisive direction within the parameters of Division Policy and Procedure." The following statement appeared in the Performance Summary in relation to complainant's performance of other management related duties: ". . . in overall analysis of work performed, you have done more for the success of the district operation during this evaluation period than any other first line supervisor in the district."

5. Complainant's performance evaluation for the reporting period of August 28, 1996, through June 15, 1997 (Respondent's Exhibit 1) was completed by Lt. Jeffrey Frenette, who was complainant's new immediate supervisor, with input from Capt. Bengtson.[5] This evaluation was marked unsatisfactory. It stated as follows, in part:

> During this evaluation period you changed momentum in your overall efforts towards improving your performance as a first line supervisor of over 8 years. Your previous evaluation outlined areas that you needed to continue to work on, however, you have shown little improvement.
>
> In an effort to rectify issues, re-establish expectations, and to gain immediate improvement, you have been counseled on these issues during the past nine months:
>
> -Timeliness of projects, reports and responses.
> -Organize work area(s)
> -Organizing projects for efficiency
> -Level of support for district management

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[5] Lt. Frenette testified that "I and the Capt. Terry Bengtson, made the decision to make this performance evaluation unsatisfactory for that period." T., 131. (Complainant's attorney had a copy of the transcript prepared and submitted a copy. The pages were not numbered, so the Commission has numbered the pages 1-204.)

-Decision making capabilities
-Methods of handling disciplinary issues
-Methods of handling personnel complaints
-Overall supervisory confidence and personal self-esteem
-Negative comments, excuses and rationalizations
-Program management
-Interaction and relationship with immediate work unit members
-Interactions and relationships with district personnel
-Knowledge of supervisory duties and responsibilities
-Scheduling issues, including hours of work and vacation agreements
-Action(s) for self improvement

As discussed, your level of performance as a first line supervisor reflects a lack of confidence, ability and desire, which is not commensurate with your 8 years of training and experience. Your dilatory efforts have affected your working relationship with peers, co-workers and upper management.

Further discussions have identified your need to become more consistent in your management style, controlled and directed by knowledge and confidence, and not by emotion or mood,

You have demonstrated a willingness to openly discuss issues and concerns and have asked for constructive feedback as you attempt to redirect your efforts. You are encouraged to continue to evaluate your strengths and identify your weaknesses for change and enhancement. Make a strong commitment towards developing and implementing a strategy for improving your overall effectiveness as a veteran supervisor.

SUPERVISION OF INDIVIDUAL TROOP MEMBERS

During this evaluation period a great deal of your time was spent at district headquarters working on past due projects, ancillary duties, some headquarters duty assignments, and a few weeks of alternate duty, all resulting in a minimal amount of field time spent with your personnel. Adjustments in assigned programs will allow you more field time to spend directly with your work unit members.

You have begun to take a closer look at your unit's efforts and have taken steps to correct deficiencies in their work product. Personal confrontation with your work unit is difficult for you and has compromised, in some cases, your ability to make decisions. Recently, however, you have shown improvement in dealing with certain members of your work unit by bringing matters to their attention

that need correction. When possible deal with these issues in a face-to-face manner.

Discussions regarding the manner in which you schedule your personnel requires that you need to enhance your understanding and application of negotiated agreements, including hours of work, and vacation selection procedures. Develop methods that reduce the number of schedule change requests that are often questioned for purpose.

Written directives to your work unit are generally organized and meaningful, however, be efficient in your written efforts and do not limit yourself to this medium when verbal confrontation should be utilized. . . .

PERFORMANCE OF DISTRICT DUTY SUPERVISORY RESPONSIBILITIES BY MONITORING AND DIRECTING DISTRICT OPERATIONAL ACTIVITIES

You have been assigned both headquarters duty and district duty throughout this period. Your responsibilities as a headquarters sergeant were refreshed with you when certain deficiencies were noted. As a headquarters sergeant you generally will perform the duties of the district lieutenant in his/her absence. Be familiar with the lieutenant's responsibilities so that those activities can be properly handled when you are assigned district duty.

With some prompting you have become more attentive to monitoring field personnel's activities, and have, on occasion, taken immediate action to ensure conformity with District/Division goals, policies, procedures, and safe operational techniques were followed. Continue to take an active role in this area to enhance field personnel's safety.

On occasion you have left messages for the Capt. and lieutenant regarding special activities that have occurred within the district during your shifts. Improve your efforts in this area by calling if urgent, or by electronic messages if information. Prompt reporting of unusual events allows a timely and professional response to other agencies, the media and public.

One of your strong points is your ability to assist others in a professional manner with walk-in and phone inquiries regarding questions on laws and administrative codes, particularly in the area of motor carrier issues; you are considered one of our primary resources in this technical area. . .

IDENTIFICATION, COORDINATION, PRESENTATION (AND ATTENDANCE) OF TRAINING PROGRAMS

> During this evaluation period you have identified training needs for some of your personnel to improve their overall performance. You have also coordinated and presented brief refresher training programs during your work unit meetings. Your desire to keep your personnel up-to-date on polices, procedures, laws, etc. is impressive and to be commended.
>
> In addition to inservice and district quarterly training you have attended seminars on improving your organizational skills, and dealing with emotions within the work place. Continue to use this training in your day-to-day supervisory duties as a method of improving your overall performance.
>
> PERFORMANCE OF OTHER MANAGEMENT RELATED DUTIES
>
> In an effort to reduce your ancillary duties and increase emphasis on direct supervision of field personnel, including ridealong time, certain programs have been reassigned. During this period you were the coordinator of the evidence program, which has since been reassigned. You were also coordinator of the district's internship program, which due to your hard work, has become very successful. Because of your understanding of this program, and your ability to provide students with a variety of activities, you have maintained oversight while reassigning the hands-on duties to one of your personnel. This delegation has freed up your supervisory time.
>
> Recently you have been more active in working traffic enforcement as you increase your field time. In an effort to maintain proficiency, continue to take action for observed violations while travelling throughout the district. Strike an effective balance between field time enforcement contacts and time actually spent working with your immediate personnel, including ridealong time as you train, mentor and lead.

Lt. Frenette had a good faith belief that this performance evaluation was justified based on the facts known to him. This performance evaluation is justifiable on an objective basis—i. e., a reasonable, similarly-situated supervisor could have reached the conclusions contained in the performance evaluation.

6. Complainant was diagnosed with bilateral carpal tunnel syndrome[6] by Dr. Szamanda, a neurologist, on August 22, 1996.

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[6] It also is undisputed that complainant was narcoleptic during the period in question. However, it does not appear that complainant is pursuing any claim regarding that condition.

7. On August 25, 1996, complainant received an e-mail from Capt. Bengtson asking for input on a workers compensation claim filed by Trooper Schramke based on carpal tunnel syndrome. In his response, complainant supported Trooper Schramke's claim and advised Capt. Bengtson that he too had been diagnosed with carpal tunnel syndrome. On August 27, 1996, complainant filed with respondent an Occupational Injury and Illness Report based on his diagnosis of carpal tunnel syndrome.

8. In Capt. Bengtson's response to complainant's occupational injury and illness report, he indicated that there was no corrective action which could be taken to prevent injury such as that claimed by complainant; when asked to identify the causes of the injury in the workplace, indicated that there were none that he could support from his personal knowledge; and, when asked what actions he intended to take, stated that he would provide wrist supports for keyboards

9. On September 10, 1996, complainant was seen by Dr. Stephen Fox, a plastic surgeon, following a referral by Dr. Szamanda. Dr. Fox recommended that surgery be performed on both wrists in October of 1996. Because of the press of DSP business, complainant decided to delay the surgery to January of 1997, and, on September 20, 1996, so notified Capt. Bengtson.

10. During October and November of 1996, complainant was assigned to investigate two personnel complaints involving troopers not directly under his supervision. These investigations required extensive writing and typing which aggravated complainant's carpal tunnel syndrome.

11. On December 11, 1996, Capt. Bengtson engaged in a phone conversation with Pam Louther of respondent's Division of Business Management in which he joked about carpal tunnel syndrome being contagious, implied that it wasn't a legitimate medical condition, characterized complainant's request for leave to have his surgery and recover from it as "two months of goofing around," and referred to complainant's post-surgery work restrictions relating to driving, writing and typing as "all that type of garbage."

12. This conversation was taped by respondent in the normal course of its operation. It was common knowledge in DOT, and both Ms. Louther and Capt. Bengtson were aware,

that such calls were taped. In his capacity as headquarters sergeant, complainant had access to this tape. On the same day (December 11, 1996) that Ms. Louther had the foregoing conversation with Capt. Bengtson, she also had a telephone conversation with complainant concerning his workers compensation claim. Subsequent to this conversation, complainant decided to access the tape of the latter call because he was not sure of some things Ms. Louther had said. During this process, complainant discovered the recording of the conversation between Capt. Bengtson and Ms. Louther. [7]

13. On January 6, 1997, surgery was performed on complainant's right hand. Complainant was released to alternate duty on January 21, 1997. Complainant was assigned by Lieutenant Frenette to headquarters duty.

14. On January 27, 1997, surgery was performed on complainant's left hand. Complainant returned to work on light duty on February 3, 1997. Dr. Fox recommended a four-hour work day, and that complainant be assigned duties which required the use of his right hand only. Complainant presented Dr. Fox's written recommendation to his supervisors upon his return to work on February 3rd

15. Upon his return to work on February 3, 1997, complainant was called into a meeting with Lieutenant Frenette and Capt. Bengtson. At this meeting, complainant's supervisors indicated that they had noticed problems with his performance since August of 1996. Complainant's supervisors also reviewed the release and recommendations from Dr Fox, indicated to complainant that they didn't think it was worth bringing him in for four hours a day, and suggested that complainant obtain a more detailed release from Dr. Fox which recommended an eight-hour work day.

16. On March 25, 1997, complainant was cleared by Dr. Fox to return to work without restrictions.

17 On or around June 9, 1997, complainant received a note from Lieutenant Frenette notifying him that an investigatory interview had been scheduled for June 12, 1997.

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[7] A copy of this recording was made part of the record as complainant's exhibit P26, as was a transcript of the recording, as complainant's exhibit P14. These documents were received over respondent's objections. This issue is addressed in the opinion section, below, see note 10.

Complainant inquired of Lieutenant Frenette what the purpose of the interview would be, and was told that it would deal with performance issues and an incident not at issue in this case.

18. On June 17, 1997, complainant received his annual performance evaluation for the period of August 28, 1996, to June 15, 1997. (See #5, above)

19. The parties stipulated, and the Commission finds, that between 1991 and 1999, 11 unsatisfactory performance evaluations were given to DSP supervisory employes.

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 and must establish that respondent discriminated against him on the basis of disability when his performance was evaluated as unsatisfactory for the period from August 1996 to June 1997.

3. Complainant has satisfied his burden to the extent of establishing that the evaluation occurred in part because of complainant's disability of carpal tunnel syndrome. However, the evaluation also occurred in part because of legitimate performance issues.

4. Complainant having established a "mixed motive" for the evaluation, the burden of proof is on respondent to establish by a preponderance of the evidence that it would have taken the same action in the absence of the impermissible motivating factor.

5. Respondent has satisfied this burden. The performance evaluation would have occurred in the absence of the impermissible motivating factor (carpal tunnel syndrome).

6. Respondent has the burden of proof to establish by a preponderance of the evidence the affirmative defense embodied in §111.34(2)(a), Stats. ("it is not employment discrimination because of disability . . . to discriminate against any individual . . . in terms, conditions or privileges of employment if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment."

7. Respondent has not satisfied this burden. Complainant's disability contributed to, but was not the sole cause of, the legitimate performance issues respondent identified.

8. Complainant is entitled to a cease and desist order and attorney's fees.[8]

OPINION

In order to establish that complainant was discriminated against on the basis of disability with regard to the performance evaluation in question, the evidence must show that: 1) the complainant is a disabled individual within the meaning of the Fair Employment Act (FEA), §111.32(8), Stats.; 2) the employer gave the complainant an unsatisfactory performance evaluation because of his disability; and 3) the employer's action was not legitimate under the FEA. *See Samens v. LIRC*, 117 Wis. 2d 646, 657-58 (1984), citing *Boynton Cab Co. v. ILHR Dept.*, 96 Wis. 2d 396, 406, 291 N. W 2d 850 (1980).

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the 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).

In *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88, the Commission described the typical disability discrimination analysis as follows:

> [A] typical discrimination case will involve the following analysis:
> 1. Whether the complainant is an individual with a disability;
> 2. Whether the employer discriminated against complainant because of the disability;
> 3. Whether the employer can avail itself of the exception to the proscription against disability discrimination in employment set forth at §111.34(2)(a), Stats.,--i.e., whether the disability is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(1)(b), Stats., which requires a case-by-case evaluation of whether the

[8] The parties stipulated to addressing the question of remedy if and when there was a conclusion of liability. Therefore, this conclusion may not reflect the entire eventual award.

complainant "can adequately undertake the job-related responsibilities of a particular job");

The first issue is whether respondent is an individual with a disability under the WFEA, §111.32(8), Stats.:

> (8) "Individual with a disability" means an individual who:
> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such impairment; or
> (c) Is perceived as having such an impairment.

Respondent contends that complainant's carpal tunnel syndrome does not satisfy this definition, arguing that subsequent to the surgery to his hands, "complainant's injuries were temporary and minor." Respondent's post-hearing brief, p. 16. In the Commission's opinion, the record supports a finding that following his surgery, complainant's condition improved significantly, but that he continued to be an individual with a disability with respect to his carpal tunnel syndrome.

This finding is supported not only by the complainant's own testimony, but also by the testimony of his neurologist. Dr. Szymanda's testimony included the following:

> Q Is carpal tunnel completely corrected by surgery?
> A What happens is that the symptoms are relieved dramatically as the nerve conduction studies that we do frequently improve, especially if the person quits doing what they did to get into that trouble in the first place. In many causes [sic], if the patient continues to do what they were doing and without recurring problems with the surgery so in most cases, especially when it reaches a certain point, it can be a cured situation, although some people do come back for re-operation and we essentially have to take them out of their job.
> Q Have you had an occasion to meet with . . . Mr. Lutze subsequent to his surgery regarding his carpal tunnel?
> A . . . yes.
> Q And, has Mr. Lutze indicated to you or have you formed an opinion as to whether or not Mr. Lutze's carpal tunnel is cured?
> A Well, it is not cured because there is some residual problem there. We . did what is called a work capacity evaluation where the patient has a study done [by] an occupational therapist and tested for strength and so forth. The power in his hands is documented and sensation is being reduced and so I don't believe he has been cured at this stage of the game, he has some residual from it. T., 77

The "Functional Capacity Evaluation" to which Dr. Szmanda refers was prepared on December 29, 1997. It includes the following:

> Significant difficulty demonstrated with fine motor dexterity using the standard Purdue Pegboard Dexterity Test. Mr. Lutze's average performance for three trials at rapid assembly tasks was 21 falling into the POOR performance category. Primary limiting factors here were difficulty feeling the parts and easy fatigue in fingers.
>
> Patient reports symptoms of paresthesias are significant with driving. Time appears to be a factor, i. e. brief periods of driving tolerated better than longer periods. Therefore, intermittent driving assignments are recommended. Complainant's Exhibit P8.

Respondent relies primarily on the medical records of Dr. Fox, who performed the surgeries on complainant's wrists. His post-operative records reflect Dr. Fox's opinion that complainant experienced a good recovery from surgery with a marked improvement in strength, and that Dr. Fox released him to return to unrestricted, full duty work on March 31, 1997. Respondent also points out that according to Dr. Fox's records, he was of the opinion as of early 1997, that there would be no permanent disability (in the context of the worker's compensation law). Complainant also was examined on April 8, 1997, by a Dr. Russell, at respondent's behest, with regard to complainant's workers compensation claim. According to this report, Dr. Russell concluded that complainant did not have any permanent restrictions, and that complainant's carpal tunnel syndrome was not work-related. This information is probative of the absence of a disability, but its weight is undermined by the fact that the record does not reflect the operative standard of disability used under the worker's compensation law which these doctors were addressing.[9] In the Commission's opinion, this evidence was outweighed by the testimony of complainant's primary treating physician/neurologist, Dr. Szmanda, and the physical therapist's report that was prepared upon referral from Dr. Szmanda, which support a conclusion that after the surgery complainant's carpal tunnel syndrome remained an impairment which made achievement unusually difficult and limited the capacity to work.

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[9] Since neither of these doctors testified, this subject was not explored at the hearing.

The next step in the *Harris* analysis is the determination of whether complainant was discriminated against on the basis of his disability in regard to this unsatisfactory evaluation. Here, the timing of the disclosure of his disability, and the fact that complainant's prior evaluations had been favorable, give rise to an inference of discrimination. The burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for the unsatisfactory evaluation. Respondent asserts that the evaluation reflected unsatisfactory work performance by complainant, and this reason is legitimate and non-discriminatory on its face. The burden then shifts to complainant to show pretext. The facts that complainant had received consistently favorable performance evaluations prior to disclosing his disability and taking leave to have it treated; that Capt. Bengtson evidenced, in his conversation with Ms. Louther, extreme skepticism and outright hostility and disdain regarding the disabling nature of carpal tunnel syndrome and the medical necessity of complainant's requested leave or alternate duty;[10] and that Lt. Frenette testified that Capt. Bengtson provided input into the evaluation are all probative of pretext, as is the fact that a document under respondent's control[11] had been altered to eliminate a comment by complainant's prior supervisor, Lt. Notbohm, that was favorable to complainant.

On the other hand, respondent's case was buttressed by the testimony of complainant's supervisors. Lt. Frenette testified that there were significant problems with the following aspects of complainant's performance:

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[10] Respondent's objection to the admission of the tape and transcript has been overruled. Respondent's objection to these items relies on the contention that §885.365, Stats., prohibits their use in evidence without both parties' consent. This statute by its terms applies only to admissibility "in the courts of this state in civil actions," not to admissibility in administrative proceedings of this nature. *See also,* §227.45(1), Stats. "an agency or hearing examiner shall not be bound by common law or statutory rules of evidence." Furthermore, it is very doubtful that the statutory proscription of such tape recordings in evidence would apply to a situation where the proponent of the evidence is seeking to use a tape made in the normal course of business by the party objecting to the evidence, and where both persons involved in the call are members of management who knew at the time of the conversation that respondent routinely taped such calls.

[11] Complainant's Exhibit P21.

1) Ineffective management of the district evidence program, including an incident where complainant broke a lock to retrieve an item of evidence, and then neither notified anyone of what he had done nor documented his actions;

2) Failure to complete the assignment of revising and updating the district SOP (Standard Operating Procedures) manual;

3) Failure to complete in a timely manner a report concerning a traffic control detail;

4) Improper handling of assigned investigations, including, in one case, improperly assuring a trooper being investigated that no discipline would be imposed as a result of the investigation;

5) Failure to adequately familiarize himself with a program involving comp time for troopers.

Complainant's response to these criticisms of his performance primarily relied on his own opinion that these criticisms were unwarranted, and/or that his work assignments were unrealistic. Complainant did not sustain his burden of showing that these criticisms were pretexts for discrimination because of disability. It must be noted that in discrimination cases of this nature, the Commission does not address the question of whether there was just cause for an adverse action. Even if the Commission were to disagree with the basis for the evaluation, or were of the opinion it was unduly negative, this does not mean that respondent did not have a non-discriminatory basis for its action. *See Russell v. DOC,* 97-0175-PC-ER, 4/24/97:

> A conclusion that there was no just cause for the discharge does not equate to a conclusion that respondent was illegally motivated. An employer's mistaken belief or inability to prevail at a hearing or arbitration is not necessarily inconsistent with a good faith belief, independent of complainant's arrest record, that discipline was warranted. However, the less support there is for the charges, the more likelihood there is of pretext. *Id.,* p. 5.

In the instant case, we have a situation where Lt. Frenette had recently taken over as complainant's immediate supervisor. The record indicates that his performance standards or expectations of complainant were more stringent than complainant's previous supervisors. The

Commission concludes that the entire record supports a conclusion that while respondent was partially motivated in its evaluation by considerations related to complainant's disability, it would have reached the same decision in the absence of such considerations on the basis of Lt. Frenette's opinions of complainant's performance. *See Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N. W 2d 234 (Ct. App. 1994): "if an employe is terminated in part because of an impermissible factor and in part because of other motivating factors, *and* the termination would have taken place in the absence of the impermissible motivating factor, the employe should be awarded only a cease and desist order and attorney's fees." (citations omitted)

Respondent argues in the alternative that if it is found to have discriminated against complainant on the basis of discrimination, its action would fall within the parameters of the affirmative defense afforded by §111.34(2)(a), Stats.:

> Notwithstanding s. 111.322, it is not employment discrimination because of disablity to . . discriminate against any individual . in terms, conditions, or privileges of employment if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment.

Respondent has the burden of proof on this issue, and has not sustained it. Complainant's disability contributed to the performance problems which figured in the performance evaluation. For example, complainant's carpal tunnel syndrome made it more difficult for him to use a computer keyboard, which was involved in a significant portion of his activities. However, the performance problems which were the focus of the negative parts of the performance evaluation—e. g., breaking the lock to obtain an item of evidence without providing either proper notice or a record of what he had done—were problems primarily attributable to failure to properly execute his program responsibilities, to which his physical problems were contributory but not central.

ORDER[12]

This matter is remanded to the respondent. Respondent is ordered to cease and desist from in the future discriminating against complainant on the basis of his carpal tunnel syndrome with regard to complainant's performance evaluations.

Dated: August 28, 2000.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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[12] This decision and order is being issued on an interim basis to provide complainant an opportunity to file a request for fees and costs, and a request for any other relief to which he may be entitled. (The parties stipulated to deferring the issue of remedy until after the decision on liability.) The Commission will enter a final decision and order once any such process has been completed.