STATE OF WISCONSIN | PERSONNEL COMMISSION

DEBORAH VAUGHAN
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,
Respondent.

Case No. 98-0211-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint alleging disability discrimination and retaliation for engaging in activities protected by the Fair Employment Act (FEA) and the Family and Medical Leave Act (FMLA). A hearing was held on April 3 and 4, 2000, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on June 26, 2000.

FINDINGS OF FACT

1. Since 1987, complainant has been employed in a position classified as a Student Status Examiner 2 in the School of Music, College of Letters and Science, University of Wisconsin-Madison.

2. Prior to February of 1998, the School of Music created a new Program Assistant Supervisor 3 position with a working title of Department Administrator. This position was created to serve as the first-line supervisor for complainant and the eight other classified staff in the School of Music, among other responsibilities. Ann Larson was appointed to this position in February of 1998. Ms. Larson's first-line supervisor was John Schaffer, Director of the School of Music, who reported to David Horvath, Associate Dean, College of Letters and Science.

3. At the time that Ms. Larson was hired, the typical practice was for School of Music staff, including complainant, to call in at least 30 minutes before the start of their scheduled work day if they were going to be absent. At this time, the School of Music employee time reporting form indicated that the two 15-minute daily breaks authorized by the applicable collective bargaining agreement could be used to extend the lunch period. The majority of the School of Music staff, including complainant, worked in locations remote from Ms. Larson's office.

4. Beginning no later than May of 1998, Ms. Larson expressed concerns to complainant about her work schedule, and brought some of these concerns to the attention of Diana Allaby, Human Resources Manager, College of Letters and Science. In a memo to complainant dated June 10, 1998, Ms. Larson reminded complainant that her approved work schedule was 9:00 a.m. through 5:30 p.m. with an unpaid 30-minute lunch hour and two 15-minute breaks; that any overtime must be pre-approved; that the lunch period is unpaid and she was not to work through her lunch period; that vacation leave should be scheduled and approved in advance; that leave time could not be used to extend a work day beyond 8 paid hours; and that complainant's time reporting form should be completed in full and should indicate actual times for arrival, lunch, and departure.

5. On June 30, 1998, complainant and a union steward met with Ms. Larson to specifically discuss certain of complainant's time reporting forms in regard to which questions had arisen about the use of breaks. It was at this meeting that Ms. Larson first learned that complainant was using her 15-minute breaks at the beginning of her work day and to extend her lunch hour Complainant reflected this on her time sheet by indicating her arrival time as 8:45 a.m. even though she did not actually report to work until 9:00 a.m.

6. In a memo to complainant dated July 3, 1998, Ms. Larson advised complainant that, "I have found that the contract does not allow breaks to extend the work day and that it is inappropriate to put on a time sheet that your day started 15 minutes before you arrived at work....Regarding your time sheet signed 7/1/98, unless

you actually worked from 8:45 a.m. each morning, your time sheet should be adjusted to reflect actual hours worked." At the time she wrote this memo, Ms. Larson was under the impression that the two 15-minute breaks authorized by the contract could be used to extend a lunch period since language to this effect appeared on the School of Music employee time reporting form. On July 22, 1998, Sylvia Sherman, on behalf of the union, filed a union grievance challenging how the School of Music was allowing employees to use their breaks and challenging the language on the time reporting form which related to extending a lunch period through the use of breaks. A meeting was held by School of Music management and the union on July 28, 1998, to discuss this grievance. Management and the union agreed that, pursuant to the terms of the applicable collective bargaining agreement, breaks could not be used at the beginning or end of a shift or to extend a lunch period, and agreed that the challenged language on the time reporting form would be removed.

7 In a memo to complainant dated July 16, 1998, Ms. Larson stated as follows, in relevant part:

> Deb – I have a question about the 6-6-98 to 6-17-98 time sheets. Are you now arriving at 8:45 a.m. If you are, the time sheets look fine; if you are not arriving in the building at 8:45 a.m., I will ask you again to change the time sheet to reflect your arrival time.

8. On July 20, 1998, Ms. Larson asked complainant, in regard to the time periods referenced in her July 16 memo, whether she was arriving at work at 8:45 a.m. as reflected on her time reporting form, and complainant indicated that she was not because she was taking a 15-minute break before she began work. Ms. Larson told complainant this was unacceptable and that she needed to record the actual arrival time, and that beginning the work day with a break was not allowed as she had indicated to her earlier. Complainant told Ms. Larson that she intended to grieve the matter, and refused to change her time reporting forms to reflect her actual arrival time.

9. On July 20, 1998, complainant filed a grievance relating to Ms. Larson's requirement that she no longer use one of her 15-minute breaks at the beginning of her work day and that she record her actual arrival time on her employee time reporting

form. This grievance was the subject of a meeting on July 29, 1998, at which complainant, Ms. Allaby, Mr. Horvath, and union steward Mary Czynszak-Lyne were present. Complainant was informed at this meeting that the applicable collective bargaining agreement did not permit a break to be used at the beginning of a shift, and was shown the relevant language in the contract. Respondent's written response to the grievance, which echoed the information about the relevant contract language which was provided to complainant at the grievance meeting, was prepared on August 11, 1998. Complainant's copy was sent to the union as the union had requested. The union did not forward a copy to complainant until late August.

10. In a July 30, 1998, email to Ms. Allaby, Mr Horvath, and Ms. Czynszak-Lyne, complainant stated as follows, in relevant part:

> I would like to summarize our discussion yesterday. Please let me know if you have a different remembrance.
>
> We met to review my grievance regarding an existing alternative work pattern. My existing work schedule is 8:45-11:45 45 minutes lunch 12:30-5:30. I take a 15 minute break from 8:45 to 9:00 and from 12:30 to 12:45.
>
> I will continue with my existing workschedule and submit timesheets that reflect that workschedule.
>
> I understand that I may expect a decision on the grievance after Ms. Allaby and Mr. Horvath meet with Mr. Schaeffer and Ms. Larson.

11. On July 31, 1998, complainant submitted to Ms. Allaby a request for leave under the Family and Medical Leave Act. This request essentially consisted of a certification form completed by complainant's physician. On this form, complainant's physician failed to complete the section which asks the physician to indicate whether or not the patient has a serious health condition. The physician indicated as follows in regard to the other relevant inquiries on the form (these inquiries appear in bold type):

> **Describe the medical facts regarding the serious health condition that impede the employe's ability to work or requires the employe to care for the patient.**

> Insomnia. Medical therapy occasionally causes A.M. grogginess.
>
> **Indicate the extent to which the employe is unable to perform his or her employment duties, or if leave is to care for a family member, indicate the care or assistance that is required.**
>
> Slow AM starts until pt [patient] adjusts to medication.

On this certification form, the physician indicated that the limitation he was describing would probably last until January 1, 1999.

12. In a memo to Music School staff dated August 11, 1989, Ms. Larson indicated that, as of August 17, "we will not be allowed to use our breaks to extend our lunch periods or arrival or departure times," and asking each staff member to submit to her a memo stating their work schedule, including their normal lunch break. On or around August 11, 1998, Ms. Allaby and Mr Horvath met with complainant and Mr. Schaeffer and advised them that breaks could not be used at the beginning or end of a shift or to extend lunch breaks, and explained that this was a union contract requirement, not a policy of the College of Letters and Science.

13. In an email to Ms. Larson and Music School staff on August 19, 1998, Ms. Sherman indicated that she had met with Mr Horvath and Ms. Allaby the day before to discuss the break issue. In this email, she stated as follows, in relevant part:

> We agreed that the employees within L&S will let both David and myself know what work schedule they would like to have. We also agreed that every effort will be made to accommodate the requests and stay within the Agreement. That is to say we will have a local agreement that is specific to the needs of the department operational needs and the employee needs.
>
> Regarding rest breaks, they can not accumulate, (to heap up, pile up of amass). That is to say the breaks can be in any part of the four hour periods. However, IF it becomes a problem, management can schedule them. None of us anticipate that to be a problem at this time.

14. In an August 19, 1998, email, Ms. Sherman advised complainant that " schedules should not change until we get this ironed out. Talk more with you

tomorrow." Complainant testified that, as a result of this email, she resumed coming in at 9:00 and using a 15-minute break to cover the time from 8:45 to 9:00 a.m.

15. In an August 21, 1998, email to Ms. Sherman, complainant asked, "What schedule an I supposed to be working now? My original schedule was 8:45 with the 15 minute break immediately You told me not to change my schedule, but you also told me that Horvath/Allaby were not accepting the 15 minute break at that time. I want to work whatever schedule I'm supposed to work so I won't have any more problems with Ann."

16. Ms. Allaby notified Ms. Larson on September 9 or 10, 1998, that complainant had filed an FMLA request, that it had been granted, that complainant's FMLA leave would be taken intermittently at the beginning of her shift, and that, as a result, complainant should be required to indicate when she called in her absence whether it was part of her approved FMLA leave.

17 In a September 10, 1998, email to complainant, Ms. Larson indicated as follows, in relevant part:

> I heard from Diana Allaby that you will be using Sick Leave time intermittently, under the conditions of the Family Medical Leave Act, by calling in and arriving later in the morning. I understand that you will need to specifically report that you are using this provision when you call in. According to our agreement, your beginning work time is 8:45 a.m.
>
> On Sept 2, as well as Sept 9 and 10 I observed you arriving after 9 a.m. and had not heard from you. ...

18. In a September 11, 1998, email to Ms. Larson, complainant stated as follows, in relevant part:

> We have been instructed by our Union president to keep our original work schedules, which means I arrive at 9:00. I wasn't here on September 2nd, so I don't believe you could have observed me arriving late on that day.

19. In an email to complainant on September 14, 1998, Ms. Sherman stated as follows, in relevant part:

> As I understand: All of the staff have submitted some alternative Work Schedules. Mgmt is looking at them and how they will jell together and provide the coverage that is needed to meet operational needs. In the mean time each of you continue to work (according to the rules) your work schedules. That is NO accumulating breaks for lunch time and the lunch hour situation is being looked into by Eng and the Union. That is if your work schedule is 8:45 to 4:45 that is what you work. If you wish to take a lunch hour you will need to tell your employer on that day
> Any more questions? Gosh I don't see what the problem is. It seems pretty straightforward to me. However, if it is unclear let me know and I will try again.

20. In an exchange of emails on September 14, 1998, Ms. Sherman told complainant that she could take a break from 8:45 to 9:00 if respondent allowed it but that was not the Alternative Work Pattern to which complainant had agreed, and that complainant could probably take a 45 minute lunch with a 15 minute break added to it.

21. In a memo to complainant dated September 16, 1998, Ms. Larson reminded complainant that her work schedule was 8:45 a.m. to 5:30 p.m. with a 45-minute lunch break from 12:00 to 12:45; noted that, on September 3, 9, and 10, she arrived at work after 9:00 a.m. but indicated on her time sheet that she had arrived at 8:45; that, because complainant's arrival time would vary due to the taking of intermittent FMLA leave, complainant was required to email Ms. Larson each day upon her arrival at work and to call Ms. Larson before the beginning of her work day if she would be arriving late. The daily email requirement had been suggested by Kathy Stella in respondent's central Classified Personnel Office.

22. On September 16, 1998, Ms. Sherman phoned Ms. Larson to discuss complainant's work schedule. Ms. Sherman indicated that she had told complainant that using a 15-minute break at the beginning of her work day was inappropriate, but that complainant wanted it in writing. Ms. Sherman also raised the issue of the daily email requirement. Ms. Larson told her that it was intended to be in place for only a short period of time in order to get a handle on complainant's schedule.

23. In a September 16, 1998, email, complainant advised Ms. Larson that she had just talked to Ms. Sherman, that she would be in her office at 8:45, go to lunch

from 12:00 to 12:45, and leave work at 5:30; that she would take two 15-minute breaks but they wouldn't be attached to lunch or the start or end of the day, or combined; and that she understood that she was to email Ms. Larson when she arrived at work only on those days she was using FMLA leave.

24. In a September 17, 1998, email, Ms. Allaby instructed Ms. Larson to advise complainant that she was required to email her arrival every day, not just those days on which she was taking FMLA leave.

25. In a memo to College of Letters and Science chairs and department administrators dated October 8, 1998, Ms. Allaby distributed a copy of the UW-Madison Work Schedule policy for classified staff, and suggested that this policy be reviewed carefully before alternative work schedules were approved. This policy provided that unpaid lunch hours are a minimum of 30 minutes, and that breaks cannot be accumulated or otherwise included in computing lunch periods or starting/ending times.

26. In an October 14, 1998, email to Music School staff, Ms. Larson indicated that she was putting a copy of the policy referenced in ¶25, above, in staff boxes that day; highlighted the policy's provisions regarding the lunch period and breaks; and suggested that staff review their current schedules and, if they didn't comply with these provisions, to talk with her and let her know how they wished to adjust their schedules.

27 In an October 23, 1998, email to Ms. Sherman and Ms. Czynszak-Lyne, Ms. Allaby indicated that she was following up on their meeting of the previous week and stated as follows, in relevant part:

> I have discussed with Ann Larson the issue of Deb having to email Ann upon Deb's arrival at work. Ann believe that it would be appropriate for Deb to email Ann upon Deb's arrival at work only on those days when she has called to alert Ann that she will be late and, therefore, arrives later than her regularly scheduled begin time of 8:45 a.m. Ann will be giving Deb a letter indicating this and also indicating that Ann expects to be called at least 30 minutes before Deb's regularly scheduled arrival (i.e., by 8:15 a.m.) on those days when Deb anticipates a later arrival. On the days Deb does not call in a late arrival, Ann will assume Deb is in the office at 8:45 a.m.

The 30-minute call-in requirement was suggested by Ms. Sherman, and Ms. Allaby and Mr. Horvath suggested to Ms. Larson that this requirement be adopted for application to all School of Music staff. This suggestion was not adopted, and the requirement was removed from complainant in December of 1998 or January of 1999.

28. In an October 23, 1998, email to Ms. Allaby, complainant indicated that she had heard that she didn't have to email Ms. Larson each morning and wanted Ms. Allaby to confirm this for her; and requested a copy of her approved FMLA request. In response later that day, Ms. Allaby indicated that complainant should continue emailing Ms. Larson each day until she received a letter from Ms. Larson indicating that a different procedure was in place. In an October 26, 1998, email to Ms. Allaby, complainant indicated that she had not yet heard anything from Ms. Larson in regard to a revised email requirement, and that no one else was subject to an arrival email requirement.

29. In a memo to complainant dated October 26, 1998, Ms. Larson stated as follows, in relevant part:

> I have discussed with Diana Allaby the requirement of having you email me upon your arrival at work every morning. I am changing this requirement as I believe it would be appropriate for you to email me upon your arrival at work only on those days when you call indicating you will be arriving later than your regular start time of 8:45 a.m. This will take effect immediately on Wednesday, October 28, 1998.
>
> On the days you will be arriving late you must call and inform me, or call Joann Schultz if I am unavailable, at least 30 minutes before the start of your shift. When your late arrival is due to reasons covered under the Family Medical Leave Act, you must indicate this when you call in. ...

30. Other School of Music staff submitted the following to Ms. Larson in response to her communications relating to the requirement that all work schedules be in compliance with the applicable collective bargaining agreement and College of Letters and Science policy:

a. Michael Pare submitted the following schedule on July 23, 1998: 7:30 to 12:00; 12:30 to 4:00. This schedule complied with all requirements.

b. Rita Mullen submitted the following schedule on July 24, 1998: 7:30 to 4:00 with lunch from 12:00 to 12:30. This schedule complied with all requirements.

c. Bev Bingham submitted the following schedule on July 27, 1998: Monday and Tuesday 7:30 to 4:00 with lunch from 12:00 to 12:30 and Wednesday 7:45 to 11:45. This schedule complied with all requirements.

d. Martha Schultz submitted the following schedule on August 3, 1998: 8:30 to 4:30 using her two breaks for a lunch from 12:00 to 12:30. Ms. Larson told her that this schedule was not in compliance because it did not provide for at least a 30-minute lunch period not connected with a break and it was changed to 8:15 to 4:45 with lunch from 12:30 to 1:00 effective October 14, 1998.

e. Gail Johnson, who apparently worked a different schedule during the school year than during the summer, submitted a schedule on September 30, 1998, which did not provide for a lunch period. Ms. Larson advised her that this would have to be changed. Ms. Larson met with Ms. Johnson and her representative on October 14, 1998, to discuss her schedule. On November 4, 1998, Ms. Larson reminded Ms. Johnson that she had still not received a schedule from her which provided for a lunch hour and one should be forwarded as soon as possible. Ms. Johnson submitted a schedule which satisfied all requirements on November 5, 1998.

f. Vicki Whelan submitted a schedule on November 9, 1998. This schedule called for her to work 7:45 to 4:30 with lunch from 11:45 to 12:30. This schedule complied with all requirements.

g. Ed Ripp worked the standard state hours of 7:45 to 4:30 with a 45-minute lunch which complied with all requirements.

h. Bonnie Abrams submitted a schedule which complied with all requirements some time prior to the beginning of the fall semester of 1998.

Although some of these employees may have continued to have questions about the relevant schedule requirements, e.g., Ms. Whelan continued to question the application

of the 30-minute lunch period as late as January of 1999, the record does not show that any of these employees failed to work the hours set forth in the compliant schedules they submitted to Ms. Larson.

31. In a memo dated November 11, 1996, Phillip Certain, Dean of the College of Letters & Science, stated that overtime hours needed to be held to a reasonable level, that overtime hours require the prior approval of an employee's supervisor, that supervisors were required to keep track of the number of overtime hours worked by their subordinates and to report those hours, and that overtime hours in excess of 80 in a fiscal year would require additional documentation and may be disallowed.

32. During the relevant time period, Ms. Larson approved only part of an overtime request from complainant on the following three occasions:

> a. In a request dated January 11, 1999, complainant requested "up to 8 hours" of overtime during the period of January 11-22 because it was a busy time of year, and she needed to work on fellowships and registration. In response to this request, Ms. Larson indicated that, "I'll approve up to 4 hours and we can re-evaluate if necessary."
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> b. In a request dated April 9, 1999, complainant requested 5 hours of overtime to work on exams, admissions, offer letters, registration, and computer problems. In response to this request, Ms. Larson indicated that she would approve up to 3 hours and asked, "How can we predict computer problems?"
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> c. On April 23, 1999, complainant requested "up to 5 hours" of overtime during the April 26-30 pay period for "learning ISIS, appointment letters, advising, admissions, exam wrap up and graduation certification." In response to this request, Ms. Larson indicated that 3 hours were approved and that complainant should "see me if you will use more than 3 hours. No time after 6:30 p.m. is approved without discussing the reasons first."

33. Ms. Larson approved complainant's February 19, 1999, overtime request for 5 hours for early grad meeting, two fellowship deadlines, TA budget deadline, ISIS training, exams-summary reviews, and applications; complainant's April 3, 1999, overtime request for 4 hours for offer letters, registration, and exams which were all time-sensitive, and indicated to complainant that she would approve up to 5 hours for

these purposes; complainant's May 5, 1999, overtime request for "up to 5 hours" for learning ISIS, appointment letters, advising, admissions, exam wrap up and graduation certification, but noted that she would not approve time after 6:30 p.m., and complainant's August 30, 1999, overtime request for up to 3 hours for registration.

34. Complainant used no more than .75 hours for the May overtime request. Complainant used 5.75 hours of pre-approved overtime in April of 1999 even though her requests were for a maximum of 14 hours and she was authorized by Ms. Larson to use 11 hours. Complainant used a total of 9 overtime hours in April of 1999. Complainant used 3.5 hours of pre-approved overtime in January of 1999 and had been authorized by Ms. Larson to use 4 hours. Complainant used a total of 6.75 hours of overtime in January of 1999. Ms. Larson authorized payment for all overtime hours worked by complainant.

35. Between August of 1998 and January of 2000, the only staff of the School of Music for whom a larger number of overtime hours were approved than were approved for complainant (60.8 hours) were:

> (a) Gail Johnson (61.85 hours)—14.25 of these hours occurred in April of 1998 when she became responsible for the tickets for the varsity band concert on an emergency basis when a private contractor backed out;
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> (b) Rita Mullen (162.5 hours) and Michael Pare (275.05 hours)—these two staff members had significant responsibilities relating to musical performances; although Ms. Larson consistently suggested to them that they needed to rely to a greater extent on student help, difficulties were encountered locating students who were able to work the hours or the schedules the performances demanded.
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> (c) Ann Larson (133.35 hours)—many of these hours resulted from her assumption of additional responsibilities on an acting basis.

36. Between January 31, 1999, and May 22, 1999, when she was learning the payroll process, Ms. Larson made six payroll errors. Four of these affected complainant and one of these four worked to her advantage. The other errors affected Rita Mullen and Martha Schultz. All of the errors were corrected when brought to Ms. Larson's attention.

37 Between August 21, 1998, and January 13, 2000, complainant was permitted to work past 6:30 p.m. on February 2 and April 21, 1999. Others who worked past 6:30 p.m. during this time period were:

> (a) Gail Johnson—this was on an emergency basis when a private business backed out of a contract relating to the sale of varsity band concert tickets and Ms. Johnson had to coordinate the sale herself in order to meet a deadline.
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> (b) Michael Pare—his job responsibilities involved managing evening performances;
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> (c) Rita Mullen—it was part of her job responsibilities to be present for concerts and many of these concerts were performed in the evening; on one or two occasions, she worked past 6:30 to prepare concert programs;
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> (d) Vicki Whelan—this occurred seven times between February 12 and March 11 of 1999 when she was preparing to leave her position and wanted to complete certain financial documents before she left;
>
> (e) Bonnie Abrams—this occurred on August 21 and September 16, 1998;
>
> (f) Ann Larson—this occurred five times between October 30, 1998, and April 15, 1999, when she had assumed additional duties on an acting basis.

38. The collective bargaining agreement which applied to complainant and certain other School of Music staff provided for a night-time pay differential after 6:00 p.m. During the time period relevant here, Ms. Larson was under the mistaken impression that the night-time differential applied to time worked after 6:30 p.m. Ms. Larson authorized payment to complainant for all hours she worked past 6:00 p.m.

39. Between August of 1998 and February of 2000, the College of Letters and Science approved the FMLA requests of five employees other than complainant. None of these five was required to email his or her supervisor upon arrival at work. Of these five, four took their FMLA leave in at least one-day increments and the other did not work in a location remote from his/her supervisor

40. During Ms. Larson's tenure as supervisor, no employee of the School of Music other than complainant was required to email their arrival time or call in 30 minutes prior to the beginning of their shift. During this time period, Ms. Larson was not aware that any other School of Music employee was not arriving at work at the time recorded on their time reporting form.

41. During Ms. Larson's tenure as supervisor, she did not restrict any School of Music employee other than complainant from working past 6:30 p.m.

42. Complainant used FMLA leave only three or four times from August of 1998 through January of 1999.

CONCLUSIONS OF LAW

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

2. Complainant has the burden to show that she was discriminated/retaliated against as alleged.

3. Complainant has failed to sustain this burden.

OPINION

The issues to which the parties agreed are as follows:

> Whether respondent discriminated against complainant on the basis of disability or retaliated against her for engaging in activities protected by the Fair Employment Act (FEA) or the Family and Medical Leave Act (FMLA) in regard to the following:
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> A. From September 16, 1998, through October 26, 1998, complainant was required to email Ms. Larson daily upon her arrival at work.
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> B. On September 16, 1998, Ms. Larson required complainant to change her two daily breaks prior to this requirement being imposed on other School of Music employees.
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> C. After October 26, 1998, complainant was required to email her FMLA leaves to Ms. Larson and to call in her absences at least 30 minutes prior to the start of her scheduled work day.

> Whether complainant was discriminated against on the basis of disability or retaliated against for engaging in protected FMLA activities in regard to the following:
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> D. During the spring semester of 1999, Ms. Larson reduced complainant's request for overtime hours on three occasions.
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> E. During 1999, complainant was not permitted to work past 6:30 p.m.
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> F. During the 1/31/99-2/13/99 pay period, Ms. Larson failed to credit complainant's leave balance with 3.25 hours of compensatory time; during the 2/14/99-2/27/99 pay period, Ms. Larson deducted 6 hours of compensatory time rather than .6 hours from complainant's leave balance; and, during the 2/28/99-3/3/99 pay period, Ms. Larson credited 1.25 hours of complainant's compensatory time to another employee.

Disability Discrimination

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 the context of discrimination regarding terms and conditions of employment, a prima facie case is demonstrated if the evidence shows that 1) the complainant is a member of a protected group; 2) the complainant suffered an adverse term or condition of employment; and 3) the adverse term or condition exists under circumstances which give rise to an inference of discrimination.

In order to obtain protection under the FEA's prohibition against disability discrimination, a complainant must show that he or she is an "individual with a disability" within the meaning of §111.32(8), Stats., i.e., has a physical or mental

impairment which makes achievement unusually difficult or limits the capacity to work, has a record of such an impairment, or is perceived as having such an impairment. Here, complainant relies solely upon the physician certification which formed the basis for her request for FMLA leave to prove the existence of a disability. (See Finding 11, above). This certification describes the nature of complainant's impairment as insomnia and the limitation this impairment created as occasional morning grogginess of a few months' duration while she adjusted to medication. Complainant failed on this record to tie her impairment to significant changes in the way that she handled the major day-to-day activities of her life or to any significant limitations on her capacity to work. (See, *Renz v. DHSS*, 88-0162-PC-ER, 12/17/92; *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95.) Complainant has failed to show that she is disabled within the meaning of the FEA.

The analysis could end here. However, since this matter was fully litigated, the Commission notes that the following would be its analysis of the remaining elements of a disability discrimination claim had complainant demonstrated that she had a cognizable disability.

Alternative Analysis

A. From September 16, 1998, through October 26, 1998, complainant was required to email Ms. Larson daily upon her arrival at work.

In order to prevail on a claim of discrimination or retaliation under the FEA, a complainant is required to show that he or she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97. In the context of a retaliation claim, §111.322(3), Stats., makes it an act of employment discrimination "[t]o discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or

terminate from employment or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment."

The applicable standard, if the subject action is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the complainant's employment status. *Klein, supra,* at 6. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2. In *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996), the court stated as follows:

> Adverse employment action has been defined quite broadly in this circuit. *McDonnell v. Cisneros,* . . . 84 F.3d 256, 70 FEP Cases 1459 (7th Cir. 1996). In some cases, for example, when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purpose. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Collins v. State of Illinois,* 830 F.2d 692, 703, 44 FEP Cases 1549 (7th cir. 1987).
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> While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol-Myers Squibb Co.,* 85 F.3d 270, 70 FEP Cases 1639 (7th Cir. 1996). [I]n *Flaherty v. Gas Research Institute*, 31 F.3d 451, 65 FEP Cases 941 (7th Cir. 1994), we found that a lateral transfer, where the employee's existing title would be changed and the employee would report to a former subordinate, may have caused a "bruised ego," but did not constitute an adverse employment action. Most recently, in *Williams*, we found that the strictly lateral transfer of a salesman from one division of a pharmaceutical company to another was not an adverse employment action. .

In *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993), the court ruled that an employee did not suffer an adverse employment action as the result of a lateral transfer from assistant vice president and manager of one branch of a

bank to a loan officer position at a different branch with the same salary and benefits. The court, in requiring that an actionable employment consequence be "materially adverse," stated:

> A material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

See, Rabinowitz v. Pena, 89 F.3d 482 (7th Cir. 1996) (plaintiff failed to establish prima facie case of retaliation under Title VII - lower performance rating and work restrictions were, at most, mere inconveniences, not adverse employment actions); *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994) (lateral transfer resulting in title change and employee reporting to former subordinate may have caused "bruised ego" but did not constitute adverse employment action); *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989) ("humiliation" claimed by school principal to result from transfer to another school did not constitute adverse employment action because "public perceptions were not a term or condition" of plaintiff's employment).

Here, complainant's only reference to the impact the daily email requirement had on her employment was that, on occasion, individuals seeking her assistance were required to wait while she emailed Ms. Larson. Neither this nor the few minutes or less that it took for complainant to complete the email could be said to have a significant tangible effect on complainant's employment and complainant, as a result, has failed to show that she suffered an adverse term or condition of employment in this regard.

If complainant had succeeded in demonstrating a prima facie case of disability discrimination, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. This respondent has done by stating that the requirement was imposed because complainant's office had posted hours upon which

graduate students and others relied; that this office was in a location remote from Ms. Larson who, as a result, would not be able to ascertain whether complainant had arrived at work as scheduled unless she made a special trip; that complainant, despite being instructed otherwise by her supervisor on more than one occasion, had recently been observed arriving at work after 9:00 a.m. even though she had represented that she had arrived at 8:45 a.m.; and that complainant was now using intermittent FMLA absences at the start of her work day.

The burden would then shift to complainant to demonstrate pretext. Complainant appears to rely here primarily on the fact that no other School of Music employee was subjected to a daily arrival email requirement. However, complainant has failed to show that any other employee was similarly situated. Specifically, complainant has failed to show that any other employee in a location remote from their supervisor's had, as complainant had, failed on numerous occasions to arrive at work at their scheduled start time despite being instructed by their supervisor to do so. Complainant also argues in this regard that the daily email requirement was not justified because she should not have been expected to be present at the work site at 8:45 a.m. instead of at 9:00 a.m. Complainant apparently bases this argument on information she was provided by her union representatives. However, the record shows that respondent was consistent from at least July 3, 1998, forward in informing complainant that a break could not be used at the beginning of a work day and that this was a requirement of her union contract. Any confusion in complainant's mind created by information she received from the union would not be attributable to respondent, and would not evidence any intent on Ms. Larson's or Ms. Allaby's or Mr. Horvath's part to hold complainant to a requirement that was not clearly established, especially since the record shows that it was respondent's policy to require employees to abide by a supervisor's directive, even if grieved, unless and until the directive was overruled through the grievance process or otherwise. Moreover, the fact that the requirement at issue here was imposed because it was a part of the applicable collective bargaining agreement obviates against a finding that complainant was being singled out for special

treatment by respondent, i.e., a contract provision applies equally to all who come within the contract's coverage.

B. On September 16, 1998, Ms. Larson required complainant to change her two daily breaks prior to this requirement being imposed on other School of Music employees.

It is awkward to attempt to analyze this allegation within the typical framework because the record does not sustain the factual underpinnings of this allegation advanced by complainant. It should first be noted that there were three different schedule requirements brought to the attention of School of Music staff at three different times during the relevant time period, i.e., breaks could not be used at the beginning or end of a shift, breaks could not be used to extend a lunch period, and a lunch period must be a minimum of 30 minutes in length. Complainant was first required, beginning in July of 1998, to cease using a break at the beginning of her work day. The record does not show that this requirement was imposed on complainant before it was imposed on other School of Music employees, i.e., the record does not show that other School of Music employees were engaging in this practice. Once Ms. Larson became aware of the prohibition against using a break to extend a lunch period, she brought this to the attention of all School of Music employees, including complainant, on August 11, 1998, and directed those who were working under schedules which did not comply with this requirement to submit revised schedules by August 17, 1998. Finally, Ms. Allaby brought to Ms. Larson's attention on or around October 8, 1998, the 30-minute lunch requirement. Ms. Larson shared this requirement with School of Music staff, including complainant, on October 14, 1998, and, once again, directed staff who were working under schedules which did not comply with this requirement to submit revised schedules. It appears from the record that all School of Music employees submitted revised schedules which complied with these requirements and that, even those schedules which involved discussion and

negotiation, were in compliance within a few weeks of the applicable requirement being announced. Complainant has failed to show that she was treated differently as alleged.

C. After October 26, 1998, complainant was required to email her FMLA leaves to Ms. Larson and to call in her absences at least 30 minutes prior to the start of her scheduled work day.

Complainant has failed to show that either of these requirements constituted an adverse term or condition of employment. The first involves the requirement that, on those few days when complainant did not arrive for work at the scheduled beginning of her shift due to an FMLA absence, complainant was to email Ms. Larson when she arrived; and the second involves the imposition of a requirement consistent with complainant's usual practice and the usual practice of complainant's co-workers in the School of Music. Neither involves the type of significant and tangible effect on complainant's employment contemplated by the FEA.

If complainant had demonstrated a prima facie case, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. Respondent has satisfied this burden by stating that no other College of Letters and Science employee was subject to such an email requirement because no other employee took FMLA leave in less than one day increments except an employee who worked as a receptionist and was not located in an office remote from that of her supervisor; and that the 30-minute call-in requirement was actually suggested by complainant's union representative in an effort to assuage respondent's concerns relating to obtaining proper coverage for complainant's office when she was absent.

It is not apparent what pretext argument complainant has offered in this regard. Respondent's email requirement and reliance on the union's 30-minute call-in suggestion appear to be justified based on the circumstances at the time and no showing of pretext has been made.

D. During the spring semester of 1999, Ms. Larson reduced complainant's request for overtime hours on three occasions.

Complainant has failed to show that, under the circumstances present here, this "reduction" was an adverse term or condition of employment. The record shows as follows, in regard to the subject requests:

a. Complainant requested up to 8 hours of overtime for the period between January 11 and 22, 1999, and Ms. Larson authorized up to 4 hours—the record shows that complainant used only 3.5 hours of pre-approved overtime and 6.75 total hours of overtime in the month of January 1999;

b. In a request dated April 9, 1999, complainant requested 5 hours of overtime and Ms. Larson authorized 3 hours; on April 23, 1999, complainant requested up to 5 hours of overtime and Ms. Larson authorized 3 hours; and, on April 3, 1999, complainant requested 4 hours of overtime which Ms. Larson authorized—the record shows that complainant used only 5.75 hours of pre-approved overtime and 9 total hours of overtime in the month of April of 1999 even though she had requested up to 14 hours.

This evidence does not demonstrate that Ms. Larson's authorization of a fewer number of overtime hours than requested in these three instances had a significant and tangible effect on complainant's employment since the record does not show that complainant used even the lower authorized number of overtime hours.

If complainant had demonstrated a prima facie case, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. Respondent has satisfied this burden by stating that it was the opinion of complainant's supervisor that her work tasks could be completed within the approved number of hours, and that placing a flexible limit on complainant's overtime hours was consistent with the unit-wide effort to reduce overtime.

The burden would then shift to complainant to demonstrate pretext. Complainant appears to argue here that others in the School of Music were authorized by Ms. Larson to work many more overtime hours than she without restriction.

However, as noted in Finding 35, above, the circumstances for which the employees to whom complainant compares herself requested overtime were not comparable to the circumstances for which complainant requested overtime. Generally, these other employees worked this larger number of overtime hours to compensate for the lack of subordinate employees, or to accomplish an acting assignment as well as their permanent assignment. Essentially, complainant requested overtime to complete the tasks which were a part of her day-to-day job responsibilities. In addition, it should be noted that Ms. Larson approved other overtime requests of complainant's in full both before and after the subject requests which tends to show that Ms. Larson was not engaging in discrimination; and that complainant didn't even use all of the hours authorized by Ms. Larson in regard to the subject requests which appears to validate Ms. Larson's opinion that the requested number of hours was excessive. Complainant has failed to show pretext in regard to this allegation.

E. During 1999, complainant was not permitted to work past 6:30 p.m.

If complainant had made out a prima facie case of disability discrimination in regard to this allegation, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. Respondent has done this by explaining that complainant's responsibilities did not relate to evening events, Ms. Larson was of the opinion that complainant's responsibilities could be completed within her normal work hours, and respondent had an interest in keeping costs under control by limiting overtime and evening hours if possible.

The burden would then shift to complainant to demonstrate pretext. Two factors militate against a finding of pretext: the record does not show that complainant's work on the two occasions in question reasonably required her to work past 6:30 or that the restriction on these two occasions compromised in any way her ability to get her work done; and Ms. Larson granted complainant's requests to work past 6:30 p.m. on two other occasions during 1999.

F. During the 1/31/99-2/13/99 pay period, Ms. Larson failed to credit complainant's leave balance with 3.25 hours of compensatory time; during the 2/14/99-2/27/99 pay period, Ms. Larson deducted 6 hours of compensatory time rather than .6 hours from complainant's leave balance; and, during the 2/28/99-3/3/99 pay period, Ms. Larson credited 1.25 hours of complainant's compensatory time to another employee.

The fact that respondent corrected the errors as soon as they were discovered militates against a conclusion that this allegation states an adverse term or condition of employment.

If complainant had made out a prima facie case of disability discrimination, the burden would shift to respondent to articulate a legitimate, non-discriminatory reason for its actions which it has done here by explaining that Ms. Larson was just learning the payroll process when she made these mistakes and they were corrected as soon as they were discovered.

The burden would then shift to complainant to demonstrate pretext. The record does not support a conclusion of pretext because Ms. Larson's payroll errors affected other employees as well as complainant, and one of Ms. Larson's errors which affected complainant's payroll records was to complainant's advantage.

It should also be noted in regard to the disability discrimination charge that complainant's physician indicated her limitation would last only until January of 1999, and complainant has not alleged nor shown that she suffered from any impairment during 1999, the year in which the actions which formed the basis of allegations D, E, and F occurred. As a result, these actions could not have resulted from disability discrimination by respondent.

Even if complainant had shown that she was disabled within the meaning of the FEA, the record would not support a conclusion that she had been discriminated against on the basis of this disability.

Retaliation

Complainant has claimed her request for FMLA leave as the protected activity for both her FEA and her FMLA retaliation charges. As a result, these charges will not be analyzed separately here.

To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action.

It is undisputed that complainant's FMLA request constitutes a protected activity for purposes of both the FEA and the FMLA, and that Ms. Larson, the alleged retaliator, became aware of this request on or around September 9, 1998. However, as concluded above, complainant has failed to show that the actions which form the basis for allegations A, C, D, or F constitute adverse terms or conditions of employment or that the record sustains the factual underpinnings of allegation B offered by complainant. Although it is not clear that the actions which form the basis of allegation E constitute adverse terms or conditions of employment, it will be assumed for purposes of this analysis that they do since they had a small and isolated but tangible effect on complainant's pay. It will be presumed that a causal connection has been established as to all allegations based on proximity in time. It is concluded, as a result, that complainant has failed to establish a prima facie case of retaliation as to all allegations except E.

If complainant has established a prima facie case of retaliation as to all allegations, the remaining analysis would parallel that set forth under the alternative analysis of the disability discrimination claim, above. The result, as above, would be a conclusion that complainant did not sustain her burden to show that she was retaliated against as alleged.

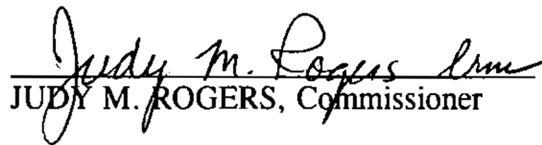
ORDER

This complaint is dismissed.

Dated: September 7, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

LRM:980211Cdec1

Parties:

Deborah A. Vaughan
204 North Main Street
Verona WI 53593

David Ward
Chancellor, UW-Madison
500 Lincoln Dr., 158 Bascom Hall
Madison, WI 53706

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