

DAVINIE ANDREWS,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

FINAL
DECISION
AND
ORDER

Case No. 99-0038-PC-ER

This is a case under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Wis. Stats.) which is before the Commission with regard to the following statement of issues for hearing:

1. Whether respondent discriminated against complainant based on her sexual orientation when it terminated her probationary employment as a Resident Care Technician 1 on August 12, 1998.
2. Whether respondent discriminated against complainant based on her sexual orientation with regard to the alleged harassment set forth in her letter to the Commission dated March 27, 2001, and received April 10, 2001, and in those portions of the attached copy of the text of the original complaint (filed March 2, 1999) which are referred to in that letter Ruling on scope of issues for hearing dated July 27, 2001.

The following are the numbered allegations referred to in the statement of the second issue:

- 1) Some of the most hurtful things on this review were those things that were an attack on my personal character. It was stated on the written review that I was a poor role model for the patients, that I had bad personal and dental hygiene, body odor, oily hair, etc. But the additional statements that were not part of the written report. Jonni [Janikowski] stated that it was reported to her by an unnamed person that I had left a sanitary pad in the waste can, in the employee restroom, unwrapped. She also stated that I had been seen leaving the rest room with what was believed to be feces on my hands.

- 2) I also became aware that the newly placed signs in the restroom were for my benefit. . . The sign in the bathroom about hand washing was moved and amended. I was now starting to feel as if someone was "listening" while I was in the restroom and started to use the facilities off the unit as much as possible.
- 3) Jonni's closing comment that I was never again to mention my sexual orientation on the unit, as some of the employees found it offensive. She then stated that it was told to her that I had been sitting in the day room with other staff (with patients nearby) when I was asked by one of them (staff) if I was married. It was alleged that I said "no, I prefer women." I told Jonni that this never happened, but I don't think she believed me. . . While I was told during the review not to mention my family on the unit, I still could hear the other unit employees socializing and discussing their families (and occasionally even their sex lives) while at work in the nurses station and out on the unit. I entered the nurses station and there was Jonni, the very person who said we were not to discuss our families at work, talking with the staff about her son's upcoming court date. During this review I was also told to keep careful track of my break times so that I would not be late. This rule was also obviously just for me as other employees often returned late from their breaks without reprimand.
- 4) I now felt that this review itself was harassment as I felt that a supervisor should help preserve my rights to a harassment free work place, instead of incorporating personal opinions, and unsubstantiated, cruel comments into my review.
- 5) Also I only had one meeting with Jonni during the entire month [July 1998] to discuss my progress. It lasted approximately three minutes. Jonni asked me what feedback nurses had been giving me and I said none. She then stated that nothing had been reported to her either and that was the end of the meeting.
- 6) One shift I received a phone call from my daughter's social worker while I was at work. I talked to her briefly and went back to work. I thanked the nurse on duty for letting me take the call and explained that it was a hospital social worker about my daughter. The nurse then told me that even though I was speaking with another hospital employee that this was considered a personal phone call and that from now on I would have to talk to her during my lunch break from a pay phone. I related this to the social worker who told me that she had never heard of such a thing before.

- 7) I found out over the weekend that I needed to go to court with my daughter the following Monday. Since Jonni was not working that weekend I contacted the nursing supervisor (Darleen Kemp) on duty who contacted scheduling for me on my behalf and gave me permission to come in late that day. When I went to work that Monday I arrived well within the amount of time I had been granted and assumed all was well. Later that day a staff member who seemed as if they were trying to help me, warned me that Jonni had written me up for being late. This seemed strange to me since Jonni was there when I came in late and never said a word to me. Two days later Jonni had me fill out a leave slip and I told her I had already completed one when Darline had granted me the time off. She told me to fill it out anyway so I did. Later when I heard that Jonni was still pressing the issue of my absence I talked directly with Darline who apparently straightened this matter out as this was the last I heard of it.

FINDINGS OF FACT

1. Complainant's sexual orientation is homosexual.¹
2. On September 29, 1997, complainant began her employment with respondent's Winnebago Mental Health Institute (WMHI) as a Resident Care Technician (RCT). Complainant was required to complete a 12 month probationary period. Complainant's probationary employment was terminated on August 12, 1998, for failure to meet probationary employment standards.
3. In October 1997, complainant participated in the New Employee Orientation program and received, among other things, the WMHI Policy and Procedure Manual which covers patient/employee relationships (R-118). This policy includes a prohibition against employees sharing personal information about themselves with patients. She also received policies covering attendance (R-119), and employee health services and infection control (R-117), which includes a section on hand washing as a means to break the chain of infection.

¹ The WFEA defines "sexual orientation" as "having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference." §111.32(13m), Wis. Stats.

4. Complainant's first supervisor was Greg Hupfer, RN and Unit Supervisor on Petersik Hall South (PHS). He conducted monthly, three and six month performance reviews, and they were accompanied by nursing staff input, the details of which are noted below, in relevant part:

Month 1: Started on PHS - will orient to unit.

Goals for Month 2: Demonstrate competency in group assignments and understanding unit rules and routines. (reviewed and signed by complainant on 10-22-97)

Month 2 Comments: Continues to orient to job duties. Relayed concern of coworker attitude toward her.

Goals for Month 3: Demonstrate competency in job duties, which will allow coworkers to gain confidence in Dee's ability. (reviewed and signed: 11-22-97)

Month 3 Comments: Needs to attend to security issues on unit including attention to environment & behavioral changes in patients.

Goals for Month 4: Demonstrate competency in attending to security issue through the use [of] feedback from manager

Month 4 Comments: [none] (C-1, last page)

5. On complainant's three-month evaluation dated 12/29/97 (C-1, pp. 1-3), Mr. Hupfer rated complainant's work performance as follows:

| EXPECTATIONS OR STANDARDS | RESULTS & COMMENTS |
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| <p><u>Major Job Objective or Key Responsibilities:</u> Provides individualized care under the direction and supervision of an R.N.</p> <p>Goal: Demonstrates interest in patients and nursing care plan.</p> <p>Goal: Demonstrates basic knowledge of mentally ill patients.</p> <p>Goal: Demonstrates ability to complete nursing assignments and reports completion to R.N. on a daily basis.</p> <p>Goal: Recognizes and records physical</p> | <p><u>Satisfactory</u>-Asks many questions regarding patient care. Demonstrates interest in patient care.</p> <p><u>Satisfactory</u>-Demonstrates basic knowledge. Treats patients with respect.</p> <p><u>Satisfactory</u>-Needs some improvement in taking B.P.'s</p> <p><u>Satisfactory</u>-Consistently reports given</p> |

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| <p>changes in patients.</p> <p>Goal: Requests clarification of institute and nursing policies when in doubt and performs basic infection control skills on a daily basis.</p> <p>Goal: Demonstrates interest in understanding patient's behavior. Shows no hesitation in caring for patients that are assigned on a daily basis.</p> <p>Goal: Works cooperatively with nursing staff members.</p> | <p>to R.N. & requests clarification as needed.</p> <p><u>Satisfactory</u>-Requests clarification as needed for institute policy. However, needs to attend more to security procedures.</p> <p><u>Satisfactory</u>-Has interest in behavior but needs to recognize changes in behavior more readily. Needs to attend to unit environment from a security standpoint.</p> <p><u>Satisfactory</u>-Is positive toward co-workers but has had some difficulty in gaining their confidence in her.</p> |
| <p><u>Major Job Objective</u>: Provides therapeutic and clean environment for patients.</p> <p>Goal. Maintain cleanliness in patient areas and reports potential safety hazards to R.N. without hesitation.</p> | <p><u>Satisfactory</u>-Performs all cleaning duties assigned. Needs to be attentive to safety hazards including changes in behavior & attend to environment as already described.</p> |
| <p><u>Major Job Objective</u>: Provides safe environment.</p> <p>Goal: Responds to emergencies without hesitation. Knows procedures as applicable to emergencies.</p> | <p><u>Needs Improvement</u>-Needs to respond to emergencies rapidly & be aware of potentially acute situations.</p> |
| <p><u>Major Job Objective</u>: Provides services to patients.</p> <p>Goal: Demonstrates basic skills in maintaining records of patients money, clothing.</p> <p>Goal: Escorts patients on and off hospital grounds as assigned by R.N.</p> | <p><u>Satisfactory</u>-Appears to understand and [is] able to follow through with hospital policy.</p> <p><u>Satisfactory</u>-Escorts patients according to procedure.</p> |
| <p><u>Major Job Objective</u>: Displays positive attitude toward job.</p> <p>Is prompt and dependable.</p> <p>Uses time appropriately.</p> <p>Adheres to work rules.</p> | <p><u>Satisfactory</u>-Has been dependable. No incident of work rule violations.</p> |

6. On complainant's six-month evaluation dated 4/3/98 (C-2, pp. 1-3), Mr. Hupfer rated complainant's work performance as "satisfactory" in all areas including

seven items under the Major Job Objective of "Implements nursing care plan under the direction and supervision of an R.N." where he noted improvement regarding complainant's approach to the security policy and noted "vast improvement" regarding "staff attitude toward Dee. They feel much more comfortable with her." Improvement was noted relating to complainant's response to emergencies in a timely manner. "Additionally, improvement has been noted in Dee's awareness of potentially acute situations on the unit." Mr. Hupfer wrote "Vast improvement noted" in the overall results section. The "MONTHLY PROBATIONARY PERIOD EVALUATION" (C-2, last page), includes the following:

Goals for Month 4: Demonstrate competency in attending to security issues through the use of feedback from manager. (1-5-98)

Month 4 - Comments: Staff reports significant improvement in Dee's performance related to security. Feel more comfortable with her.

Goals for Month 5: Continue improvement as noted in previous month. (2-5-98)

Month 5 - Comments: Continues to improve in areas of security & safety.

Goals for Month 6: Continue to improve. (3-5-98)

Month 6 - Comments: Employee has made significant strides in improving peer attitude toward her as well [as] patient safety & security issues. (Complainant signed this (month 6) monthly evaluation on 4/3/98)

7. In April 1998, complainant transferred from Mr. Hupfer's unit to work the "Float Pool" under the supervision of Charlene Messenger, RN and Float Nursing Care Coordinator. Complainant was in the float pool for two months until June 1, 1998, when she was assigned to Petersik Hall North (PHN), where her supervisor was Jonni Janikowski, RN and Unit Supervisor. Ms. Messenger and Ms. Janikowski eventually collaborated on an evaluation of complainant's work performance in a PPD for the report period of 3/29/98 through 6/29/98 (C-4), discussed below in Finding 11.

8. Complainant's performance while in the float pool was problematical. During the periods when she was working on PHN as part of a float pool assignment,

she had a tendency to hang around in the nurses' station rather than being out with the patients. While among the patients, she had a tendency to be too confrontational with them and create risky situations. When patients needed to be restrained, she had a tendency to hang back. Her personal hygiene was poor in the areas of body odor, halitosis, and generally appearing unkempt.

9. After she left the float pool, complainant experienced a more difficult environment on PHN. The types of patients on PHN were the most difficult patients at WMHI. Many were acutely psychotic, and many had been convicted of murder, rape, or arson. Some of the patients were constantly trying to start fires. The unit's "acuity"² level was often high. The employees on PHN were very intense. Other RCT's had found them difficult to work with. In sum, it was the most difficult unit at WMHI on which an RCT could work.

10. On June 18, 1998, complainant was a "no-call, no-show" for her work shift when she failed to arrive at work on time or to provide any notice that she would be absent, and finally got to work four hours late. During the meeting held to discuss this matter, complainant explained that she had traded work shifts and forgot to call in. According to management's policy at WMHI, for their first no-call, no-show, probationary employees can either be terminated or given a verbal reprimand with notice that further violations will result in termination. Ms. Janikowski gave complainant a verbal reprimand for the June 18th "no-call, no-show."

11. On or about June 29, 1998, complainant's third performance review (C4) for the report period of 3/29/98-6/29/98, was conducted. This involved a review from both supervisors Charlene Messenger and Jonni Janikowski, and included the following:

² "Acuity" is a term of art in the nursing field. It is similar to milieu or atmosphere. When the acuity level is high, there is a higher likelihood of an incident occurring that would involve patients acting out, becoming difficult, or even violent.

| MAJOR OBJECTIVES OR KEY RESPONSIBILITIES | RESULTS (Ms. Messenger's comments are initialed "CM," and Ms. Janiskowski's comments are initialed "JJ" as they appear in the document) |
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| <p>A. Provision of individualized patient care under the direct supervision of RN.</p> <p>A1. Individualized patient care</p> <p>A2. Teaches & assists patients</p> <p>A3. Completes simple nursing procedures and treatments as requested and/or instructed:</p> <p>A4. Role models appropriate hygiene, grooming, social interactions and coping skills.</p> <p>A5. Promotes attainment of treatment goals by individualizing interactions to accommodate patient differences.</p> <p>A6. Treats patients with respect and dignity.</p> <p>A7 Utilizes observational skills in recognizing pertinent patient behavior/status and accurately reports</p> <p>A8. Interacts therapeutically by applying basic knowledge of therapeutic communication skills, developmental levels and principles of psychiatric nursing.</p> <p>A9. Works cooperatively with nursing and multi-disciplinary team members to plan, implement, and provide feedback on effectiveness of patient treatment.</p> <p>A10. Plans, implements and participates in activities and outings suited to patient abilities, interests and characteristics.</p> <p>A11. Applies knowledge gained through educational activities and practical experience to the provision of nursing care.</p> | <p><u>Satisfactory</u> CM</p> <p><u>Satisfactory</u> CM JJ</p> <p><u>Needs Improvement</u> - puts things off CM</p> <p>Has needed frequent (x 4) reminders to remove pt. from shower room. JJ (needs to be more assertive)</p> <p><u>Unsatisfactory</u> - Often hair is dirty & unkept. Has poor oral hygiene. CM Came to work with paint on arm x 3 days. Hair appears oily. JJ Body odor.</p> <p><u>Satisfactory</u> CM</p> <p><u>Satisfactory</u> CM</p> <p><u>Satisfactory</u> CM</p> <p><u>Unsatisfactory</u> - appears to lack the ability to make the connection between the pt's next IPT/Nsg. care plan, and provide appropriate pt. care. JJ</p> <p><u>Satisfactory</u> CM</p> <p>Unable to evaluate due to being in float pool. CM</p> <p><u>Unsatisfactory</u> - at times, seems to lack focus of pt. needs, care to provide, and pertinent info./feedback needed to be communicated to Charge Nurse.</p> <p><u>Satisfactory</u> CM JJ</p> <p><u>Satisfactory</u> CM - needs improvement. JJ</p> |

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| <p>MAJOR JOB OBJECTIVE:</p> <p>B. Provision of therapeutic, safe and clean environment for patients.</p> <p>B1. Assists in maintaining a therapeutic ward environment by demonstrating respect for patients when communicating with patients, co-workers and others.</p> <p>B2. Participates cooperatively as a nursing team member in completing the necessary job functions and interacts with co-workers and others in a respectful, problem-solving manner</p> <p>B3. Promotes a positive image of WMHI when interacting with patients' visitors, volunteers and community workers.</p> <p>B4. Works cooperatively with others to create an attractive and comfortable ward environment by attention to cleanliness, ventilation. and related aesthetic considerations.</p> <p>B5. Performs cleaning duties in accordance with infection control standards.</p> <p>B6. Applies knowledge gained in training for Crisis Prevention and Management (CPM) when verbal or physical intervention is required to protect patient from injury to self, others, or the destruction of property.</p> <p>B7 Responds to emergencies as taught and directed.</p> <p>B8. Attends and participates in incident review or debriefing meetings in a problem-solving manner, following use of team control procedures with patients.</p> <p>B9. Notifies nurse manager when repairs are needed. .</p> <p>B10. Completes patient accountability/safety rounds.</p> <p>B11. Escorts patients in accordance with procedures.</p> | <p><u>Needs improvement</u> - sometimes makes judgmental statements about patients. <i>CM JJ</i></p> <p><u>Needs improvement</u> - puts things off. <i>CM</i> Tends to hang out in Nurse's Station. <i>CM/JJ</i> Needs frequent reminders of tasks to be completed.</p> <p><u>Unsatisfactory</u> due to hygiene <i>CM</i> Frequently comes to work with offensive body odor, hair appears oily, paint on arm. <i>JJ</i></p> <p><u>Satisfactory</u> <i>CM</i> <u>Unsatisfactory</u> - has left to take a break leaving only 1 staff member on the unit while others out with pts. on smoking duty. <i>JJ</i></p> <p><u>Satisfactory</u> - needs reminders. <i>JJ</i></p> <p><u>Unsatisfactory</u> - Is sometimes very confrontational with volatile pts & puts herself in harm's way by not maintaining a safe distance. Seems not to understand the danger potential. <i>CM JJ</i> <u>Needs improvement</u> - hangs back. <i>CM JJ</i></p> <p><u>Satisfactory</u> <i>CM JJ</i></p> <p><u>Satisfactory</u> <i>CM JJ</i></p> <p><u>Satisfactory</u> <i>CM JJ</i></p> <p><u>Satisfactory</u> <i>CM JJ</i></p> |
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| <p>B12. Teaches and monitors patients' use of personal property B13. Assists with orientation of patients and new staff. B14. Assists and monitors patient visitation.</p> | <p><u>Satisfactory</u> <i>CM JJ</i> <u>Satisfactory</u> <i>CM JJ</i> <u>Satisfactory</u> <i>CM</i> has needed reminders. <i>JJ</i></p> |
| <p>MAJOR JOB OBJECTIVE</p> <p>C. Completion of forms and records.</p> <p>C1. Completes procedures regarding time-keeping and Automated Payroll System (APS) accurately.</p> <p>C2. Completes documentation regarding patient care. .</p> <p>C3. Receives and relays telephone messages to staff and patients.</p> <p>C4. Assists patients in mailing letters and distributes mail received.</p> <p>C5. Completes patient monetary transactions accurately.</p> <p>C6. Reports and documents incidents and injuries involving patients, staff and others.</p> | <p><u>Needs improvement</u> - Neglects to sign time sheet. <i>CM</i> <u>Unsatisfactory</u> - Has needed reminders for both pay periods while on PHN, to complete and sign timesheets - even after time due in. <i>JJ</i> <u>Satisfactory</u> <i>CM JJ</i> <u>Satisfactory</u> <i>CM JJ</i> <u>Satisfactory</u> <i>CM JJ</i> <u>Satisfactory</u> <i>CM JJ</i> <u>Satisfactory</u> <i>CM JJ</i></p> |
| <p>MAJOR JOB OBJECTIVE</p> <p>D. Participation in educational experiences</p> <p>D1. Participates in staff development.</p> <p>D2. Completes mandatory training activities as required.</p> <p>D3. Attendance [Goal handwritten by <i>CM</i>]</p> | <p><u>Satisfactory</u> <i>CM JJ</i> <u>Satisfactory</u> <i>CM JJ</i> <u>Unsatisfactory</u> - Tardy 2 X & the 2nd time was a no call, no show-4 hours late-had traded shifts and forgot. <i>CM</i></p> |

12. This performance review meeting was attended by Ms. Janikowski; Kathy Karkula, Human Resources Director; and Jenny Rew, Union Representative; and involved a discussion of complainant's performance. This included an admonition from Ms. Janikowski at the end of the meeting that complainant should not discuss certain

aspects of her personal life at work.³ Management decided that rather than terminate complainant's probation then, she would be given another month in which her performance would be closely monitored. Ms. Janikowski told complainant they would meet periodically as part of this monitoring process. However, due to their schedules, Ms. Janikowski's other commitments (she supervised about 35 employees), and several days where complainant was absent from work, they only had one short meeting prior to complainant's termination. This meeting occurred July 22, 1998.

13. Although there was some improvement in complainant's work performance, there continued to be problems, which are reflected in the following nurses' comments that appear on unsigned Performance Rating Sheets dated July 27, 1998. These are the notes of nurses who worked with complainant.⁴ Pursuant to respondent's customary practice, and due in part to her limited opportunity to observe all of her subordinates' work, Ms. Janikowski relied heavily on these notes in assessing complainant's performance. The notes included the following:

A.) Appears cleaner & neater Combing & washing hair

On occasions that I have made suggestions to [complainant] about changing her approach, she was receptive to ideas – but unclear if it changed actual way she handles situations. Problem solving skills are minimal. Dee asks questions when she's unsure, but many questions are of simple concepts.

She is trying – can see effort. (R-109)

B.) Believe [complainant] needs to make greater effort to know care plans of assigned patients.

I really haven't worked with her for a long while.

I think she's trying hard. She does a good job charting.

³ As discussed below, complainant contended, and Ms. Janikowski denied, that she (Janikowski) told her not to discuss her sexual orientation, and complainant did not sustain her burden of proving that this conversation occurred as she contends.

⁴ While these employees did not sign these performance rating sheets, they testified at the hearing and identified which sheet he or she had written.

Asks appropriate questions & isn't afraid to ask a question if she's unaware of something. (R-110)

C.) I have seen a gradual increase in [complainant's] appearance, though repeatedly asks questions about duties and pt. NCPs (Nursing Care Plans) that have not changed for an extended period of time. Continually hear about her degrees in Social Work, through unable to retain simple nursing concepts.

Does ask to take breaks. (R-111)

Not very attentive to surround[ing]s, example, when the activity is "High," she tends to not even notice. Paying attention to small (minor) details as compared to her surrounding.

D.) The problem with Dee is that I encounter more problems with her than successes. For the amount of time that she has been here, she should be grasping the basic concepts of the unit, if nothing else. However, she seems to still be fumbling her way through her job. I have discussed many of the specifics with [complainant] already of how she just doesn't seem to grasp the concepts of the unit.

She also appears to avoid working on PHN as much as possible. She trades [shifts with] other, and has also called in sick too many times for someone on probation. She doesn't appear to want to make a good impression. Just recently, she had some court issues to work out. Instead of explaining the circumstances to me and asking time to make or receive calls, she just went on her own way to do what she needed to do. One night in particular, she received a call when she was in the courtyard. This was fine, except for the fact that when the pt's were coming in, she hung up the phone, and then asked to make a call when she came in. Instead of finishing the call, not on state expense, she decided to call him back using the state phone as well as the main line.

I don't know if she is able to grasp simple concepts, or is simply unwilling to give it her best shot. She may indeed be trying hard to do a good job, but it doesn't appear that way. (R-112)

14. With regard to the preceding comment in R-112D concerning complainant's use of the phone to call an attorney, these calls were work-related, and involved a discussion with a DHFS attorney regarding an incident complainant had witnessed and

about which complainant might have had to testify. This fact was not discussed at the time by complainant and the nurse in question, who was unaware of this circumstance.

15. During a meeting on August 12, 1998, with complainant, Jonni Janikowski, Kathy Karkula and Jenny Rew, complainant was offered the opportunity to resign, as is the customary practice with probationary employees who have attendance or performance problems, but she declined. Then complainant was presented with a last performance review (R-113B, pp. 2-6), the results of which are detailed below, and her probationary employment was terminated by Ms. Janikowski, Ms. Karkula and Kathy Bellaire, WMHI Director of Nursing:

| MAJOR JOB OBJECTIVE | RESULTS |
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| <p>A. Provision of individualized patient care for adult patients under the direct supervision of RN.</p> <p>A1. Provides individualized patient care.</p> <p>A2. Teaches & assists patients.</p> <p>A3. Completes simple nursing procedures.</p> <p>A4. Role models appropriate hygiene.</p> <p>A5. Promotes attainment of treatment goals.</p> <p>A6. Treats patients with respect & dignity...</p> <p>A7 Utilizes observational skills in recognizing pertinent patient behavior.</p> <p>A8. Interacts therapeutically by applying basic knowledge.</p> <p>A9. Works cooperatively with nursing and multi-disciplinary team...</p> | <p><u>Unsatisfactory</u> (A1 - A3) - is able to complete a task when direction is given, however has a problem initiating and completing the same task when faced with it a second time. Repeatedly asks questions Re: basic concepts. Some effort to improve is noted, however.</p> <p><u>Unsatisfactory</u> - cont. complaints of body odors and inappropriate hand washing.</p> <p><u>Unsatisfactory</u> - Does not meet expectation D/T not familiarizing self enough with the care plans on her own.</p> <p><u>Satisfactory</u></p> <p><u>Unsatisfactory</u> (A7 - A9) - Continues to rely too much on others for info. re: patients and routines vs. taking the initiative to review the care plans herself. Has been receptive to RN's intervention/suggestions for a change in approach, but continues to come across as having minimal problem-solving skills as evidenced by repeatedly asking too many questions, re: simple concepts, when unsure of self.</p> |
| <p>A10. - A17. Plans, implements and participates in activities; considers safety and secu-</p> | <p><u>Satisfactory</u> - assists with outdoor activities, however, has not had an opportunity to plan.</p> |

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| <p>rity needs; applies knowledge;</p> | <p>Continues to have some difficulty with basic application of nursing care functions.</p> |
| <p>MAJOR JOB OBJECTIVE B. Provision of therapeutic, safe and clean environment for adult patients B1. Assists in maintaining therapeutic ward. B2. Participates cooperatively as a nursing team member. B3. Promotes a positive image of WMHI. B4. Works cooperatively with others.</p> <p>B5. Performs cleaning duties. B6. Applies knowledge gained in training for Crisis Prevention... B7 Responds to emergencies as taught and directed. B8. Attends and participates in incident re-view. B9. Notifies nurse manager when repairs are needed. B10. Completes patient accountability/safety rounds... B11. Escorts patients. B.12 Teaches and monitors patients' use. of personal property. B13. Assists with orientation of patients... B14. Assists and monitors patient visitation...</p> | <p><u>Satisfactory</u> - treats patients with respect <u>Unsatisfactory</u> (B2 - B4) - Has shown some effort to improve, however, still needs cues, frequently, from peers, to get up and complete tasks. Does not outwardly show support to peers. At times, makes inappropriate statements or comments in front of patients and staff, i.e., "I'm a Human Cockroach." Improvement in communicating breaks. <u>Satisfactory</u> - improvement noted. <u>Satisfactory</u> (B6-B7) - (unable to assess during this time allotment)</p> <p><u>Satisfactory</u></p> <p><u>Satisfactory</u></p> <p><u>Unsatisfactory</u> continues to need prompts to complete rounds and/or check patients. <u>Satisfactory</u> <u>Satisfactory</u></p> <p><u>Satisfactory</u> <u>Satisfactory</u></p> |
| <p>MAJOR JOB OBJECTIVES C. Completion of forms and records. C1. Completes procedures regarding time-keeping and Automated Payroll System. C2.- C6.</p> | <p><u>Unsatisfactory</u> - did not complete timesheet by 7-30-98, as per routine. <u>Satisfactory</u> (C2-C6) - does some good documentation</p> |
| <p>MAJOR JOB OBJECTIVES D. Participation in educational experiences. D1. Participates in staff development. D2. Completes mandatory training activities. D3. Participates in ongoing inservice and unit educational experiences.</p> | <p><u>Unsatisfactory</u> (D1 - D3) - Has taken an hour on meeting days. Does not review meeting minutes and signing off in pink book.</p> |

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| Noted at bottom of form: As a probationary employee, has no paid leave balance. | No results or initials noted. |
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16. It was not unusual for WMHII to terminate probationary employees during the period in question.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230. , Stats.
2. The complainant has the burden of establishing that respondent discriminated against her as alleged, as set forth above in the statement of issues for hearing (set forth above, pp. 1-3).
3. Complainant has failed to sustain her burden.
4. The respondent did not discriminate complainant as set forth in the statement of issues for hearing.

OPINION

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. *See Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985). In other words, the employer does not have to show it did *not* discriminate; rather, the employee has to show the employer *did* discriminate.⁵

⁵ This can be contrasted with the situation that occurs in a case where the employer discharges an employee who has permanent status, and the employee challenges the discharge, the employer has the burden of proof and must establish the facts necessary to show just cause for the discharge to a reasonable certainty, by the preponderance or greater weight of the credible evi-

Complainant has established a prima facie case by showing that her sexual orientation is homosexual, she was at least minimally qualified for the job she held, respondent terminated her probationary employment, and respondent terminated her probationary employment under circumstances which give rise to an inference of discrimination.⁶

The respondent has articulated a legitimate, non-discriminatory rationale for complainant's termination by its explanation, which is largely set forth in her performance evaluations and notes from co-employees, that her performance was inadequate for becoming a permanent employee. This included the failure to serve as a good role model for the patients because of her poor personal hygiene. Furthermore, her attendance was poor and at a level that provided an independent basis for probationary termination pursuant to WMHI policies.

Complainant's attempted to show pretext primarily by trying to show that her performance was not as bad as respondent portrayed it. She also advanced direct evidence of discrimination, alleging there were comments made that were indicative of a bias against homosexual individuals. The major bone of contention involves a comment allegedly made by Ms. Janikowski during a performance review meeting held June 29, 1998. Complainant alleges that Ms. Janikowski told her not to discuss her sexual orientation at work, because other employees would be offended. According to Ms. Janikowski, she actually referred not to discussion of complainant's sexual orientation, but to discussion of sexual encounters, about which Ms. Janikowski had received re-

dence. See, e. g., *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 1/11/94; §230.44(1)(c), Wis. Stats.

⁶ Usually, a prima facie discharge case requires a showing that complainant was replaced by someone not in the same protected category. However, the RCT positions are essentially interchangeable, and in this case the factors on which complainant relied to try to show that the employer's rationale for her termination was a pretext for discrimination will be considered as circumstances which give rise to an inference of discrimination. See *Puetz, id.* Also, where the case has been tried fully, it is unnecessary to analyze whether a prima facie case has been established, and the Commission should go ahead and address the question of pretext. See *United States Postal Service Board of Governors v. Aikens*, 460 U. S. 711, 103 S. Ct. 1478, 75 L. Ed. 403, 1983 U. S. LEXIS 141 (1983).

ports from some of complainant's co-employees. Also present at this meeting was Jennifer Rew, a co-worker of complainant's who was present as a union representative, and testified on complainant's behalf. In her hearing testimony, she initially referred to Ms. Janikowski's comments as referring to complainant's "personal life," but then used the term "lifestyle" in response to a leading question:

Q Do you remember any comments made towards the end about my personal life?

A I do remember a discussion of your personal life allegedly being discussed on the unit. Which you had said wasn't, but supposedly I—if I can remember right, was that you allegedly was discussing your personal life on the unit. Peers, peer people you worked with had allegedly gone to Jonni on it, and that it was inappropriate for you to discuss or say anything about your personal life to your peers.

Q Do you remember the rest of the comment that was made?

A . I couldn't say exactly.

Q Was anything ever said that people on the unit might find my lifestyle offensive, and that—

A Yes, that was mentioned.

Q And perhaps that I should never mention it on the unit again because people found it offensive?

A Offensive, yes.

Ms. Janikowski testified specifically that her concern about complainant's statements ran to "personal encounters" and "sexual encounters" which other employees had reported to her. Her adverse examination by complainant included the following:

Q Do you remember when we were having the review, and at the end of the review you basically looked at me and said please—you said one last thing, never mention your sexual orientation on the unit again because the workers there find it offensive. Do you remember that comment?

A I remember making a comment, but that's not exactly what I said. What I said was that you shouldn't be speaking of your sexual encounters in front of the staff because some of them find it very offensive. Not your sexual orientation, because I've supervised other people on the unit—several other people who had—how do you want me to say it—that were not heterosexuals, and I never had to say anything to them because they didn't talk about sexual encounters, or did I have to say anything to anybody who was a heterosexual about their encounters, because I had no reports of anyone talking about their sexual encounters, be it with the

same sex or opposite sex. It's just inappropriate to be speaking about those kinds of things out in front of the patients.

Complainant has the burden to establish the facts necessary to her claim under the preponderance of the evidence standard, which the Wisconsin Supreme Court has explained as follows:

The standard to be used by the Personnel Board [the predecessor agency to the personnel commission] in making its findings should be that used in ordinary civil actions, to a reasonable certainty, by the greater weight of the credible evidence standard. .The function of the board is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence.

Reinke v. Personnel Board, 53 Wis. 2d 123, 137-38, 191 N. W 2d 833 (1971) (footnote omitted). On the basis of its assessment of the evidence, including the credibility of the witnesses, the Commission concludes that complainant did not satisfy her burden of proof with regard to this conversation, and the Commission does not find that Ms. Janikowski referred to complainant's sexual orientation or lifestyle in her comments at the end of the June 29, 1998, evaluation session.

Pretext also can be inferred from differential treatment of other employees by the employer. Complainant argues that it can be inferred that the alleged statement or statements by her about her personal life that generated Ms. Janikowski's concerns must have been part of a conversation with other employees, who also must have been involved in an inappropriate conversation, but who were never subjected to corrective action by management. It simply does not follow that the context of the alleged statement(s) by complainant must have included other employees having engaged in conversation about inappropriately personal conversations. Also, Ms. Janikowski testified that she did not consider this admonition to be part of complainant's written evaluation, so she conveyed her concerns to complainant verbally at the end of the review session. It does not constitute an indication of pretext with regard to the rationale for complainant's termination that she (Janikowski) did not launch an investigation into the circum-

stances surrounding complainant's statements before making the comment to complainant.

Complainant also argues that pretext is indicated by the fact that Ms. Janikowski only met with her once during the last month of her probation. Ms. Janikowski explained that due to her and complainant's schedules, and the demands of her (Janikowski's) job, it was difficult to find mutually convenient times for meetings. As noted above, Ms. Janikowski supervised 35 employees. It is undisputed that complainant's attendance was spotty during this period, that she worked a lot of overtime,⁷ and that, consistent with common practice at WMHI, she frequently took an hour of vacation time between double shifts, thus being unavailable for one of the periods when such a meeting could have been arranged. Complainant argues that she would have made herself available if Ms. Janikowski had left a message that she wanted to have a meeting. Ms. Janikowski felt that complainant failed to meet her half way in being available for a meeting. In light of these circumstances, the fact that Ms. Janikowski had only one meeting with complainant during the last month of her PPD provides little, if any, evidence of pretext.

With regard to complainant's actual performance, complainant tried to show that her performance was better than portrayed by respondent, and that there were minimal performance problems noted until she was assigned to PHN. She argues that at PHN she was set up by employees who were prejudiced against her because of her sexual orientation, and that these employees perpetuated a stereotype about her that influenced other staff's perception of her. Complainant called several witnesses over the course of the two-day hearing that was held in this case. Their testimony, in summary, was that complainant was a competent probationary employee with no personal hygiene problems of which they were aware.

Greg Hupfer supervised complainant during her first six months of employment at WMHI. His first performance review (C-1), for November and December 1997, was mostly favorable, but he noted some problems with complainant's performance

⁷ It was common for the least senior RCT's to have to take involuntary overtime.

concerning security issues and in gaining the confidence of other staff. By the time of her second evaluation (C-2), for January-March, 1998, he noted considerable improvement in complainant's performance. This evaluation, and her overall performance during the first six months of her employment, are indicative of pretext because they generally are inconsistent with subsequent reports about her performance. However, management's concerns about her performance did not arise solely after she began working in PHN.

One of respondent's witnesses was Jane Kramer, an RN who was the charge nurse on the p. m. shift in PHS in 1998, and was responsible for directing RCT's, including complainant, when complainant was in Greg Hupfer's unit. She had a number of criticisms of complainant's performance, some of which are recorded in a Resident Care Technician Performance Rating Scale dated December 22, 1997. (R-102) Much of her commentary on this document relates to security issues, but she also commented on complainant's inability "to generalize the information to the next incident," and said "she asks many questions, but often at inappropriate times. She takes direction mostly from specific staff and appears to ignore it from others."

The significance of Ms. Kramer's concerns is lessened somewhat when it is considered that her evaluation occurred after complainant had only been at WMHI for a few months, and according to Mr. Hupfer, her performance improved as she went along. However, complainant subsequently was in the float pool for two months (April and May 1998) prior to her assignment to PHN. In the float pool she was supervised by Charlene Messenger. While assigned to the float pool, complainant worked in units all around WMHI. Ms. Messenger observed many of the same performance problems that concerned management when complainant was on PHN. There is no evidence in the record that Ms. Messenger was aware of complainant's sexual orientation⁸ when she (complainant) was in the float pool. Complainant's performance problems were documented by complainant's third PPD (C-4), which covered the period of April, May,

⁸ This was true of most of the employees whose observations or opinions of complainant's performance are on this record.

and June, 1998, and which was a collaboration between Ms. Messenger, who covered the first two months when complainant was in the float pool, and Ms. Janikowski, who covered the last month when complainant was on PHN. There are a number of common or similar observations about complainant's performance. See Finding 11, above. In her testimony, Ms. Messenger talked about complainant's poor judgment regarding security issues, and problems with personal hygiene—body odor, unkempt hair, and halitosis. Ms. Messenger's period of supervision covered complainant while she was on many units, and she said she personally observed some of the problems, including complainant's personal hygiene, which in general was an area that generated a lot of conflicting testimony. Under these circumstances, it seems unlikely that she would have been influenced by a stereotype about complainant perpetuated by PHN employees who were prejudiced against complainant because of her sexual orientation, as complainant contends.

With regard to attendance, complainant's record, which included a zero earned leave balance at the time of her termination and a "no call, no show," would have been an independent basis for termination of a probationary employee under complainant's standard operating procedures. Complainant's absences were to some extent accounted for by her hospitalization from August 1-3, 1998, for "depression with suicidal ideation." (C-5) Complainant contends that this hospitalization was caused by mistreatment at work, and apparently argues that this absence should not have been held against her. One problem with this contention is that there is no medical evidence that would support this contention. The hospital records she introduced in evidence (C-5) do not express an opinion to that effect but merely record complainant's statement as part of the patient history. Also, the records refer to stress at home as well as at work—e. g., "under much stress at work and at home. Feels as though she is being harassed at work," (C-5, p. 2), and "[p]atient stated that she was very stressed out by her job and having difficulty coping with that."⁹ (C-5, p. 3) Complainant also argues that her stress

⁹ This statement is followed by several lines that complainant deleted from the document by use of a felt tip marker.

at home was a product of her stress at work, but there also is no evidence to support this contention except complainant's opinion.

Complainant also argues that respondent should have honored her request to be transferred to another unit, since her performance was rated problematical only at PHN. However, the record shows that complainant's performance on the float pool was also evaluated as problematical. Furthermore, respondent's witnesses testified that it was important that all employees be able to function well on all units at WMHI, and that a transfer such as complainant wanted would cut down on the span of evaluation of complainant's performance, since on a new unit she would be starting all over again.

Another factor complainant relies on is that she spoke to Jane Walters, the Assistant Director of Nursing, regarding her concerns about harassment, but there was no indication that management did anything about this. Ms. Walters confirmed that complainant did come to her in this fashion. She (Walters) said she spoke to both Ms. Janikowski and Kathleen Belaire, the Director of Nursing, about this conversation, but that she does not know what, if anything, occurred from there. The Commission agrees that management's failure to make any concrete response to this complaint is probative of a lack of sensitivity to concerns about discrimination. Accordingly, this evidence will be considered along with the rest of the evidence relevant to the issue of pretext.

In conclusion on the issue of pretext, the record is clear that Ms. Janikowski received a lot of feedback from other employees about problems with complainant's performance and personal hygiene, and that complainant's attendance alone would have been a basis for probationary termination under respondent's policy. In relying on evaluations of complainant from other employees, primarily RN's, Ms. Janikowski followed her normal procedure. Complainant contends that some employees were prejudiced against her and either fabricated or grossly distorted performance issues, including personal hygiene, in an effort to set her up. There was evidence, in the form of testimony about complaints from some of the PHN employees who were unhappy with complainant's discussion of her personal life or sexual encounters, from which it can be

inferred that some of the employees on PHN were aware of complainant's sexual orientation. However, as to most of the witnesses called by respondent who testified about their views on complainant's performance and hygiene, there is no evidence as to whether they were aware of complainant's sexual orientation, or even had an opinion about it.

Complainant produced a good deal of supportive testimony from co-employees (primarily from Mr. Hupfer's unit) who said they perceived no problems with complainant. This tends to show pretext because it is to some extent inconsistent with the picture of complainant portrayed by management. However, it is undisputed on this record that PHN, where the majority of complainant's perceived problems occurred, was the most difficult assignment at WMHI. Furthermore, Steven Mayer, one of complainant's witnesses, testified that the staff on PHN were generally known as difficult people with whom to deal, and that he had experienced problems with some of them himself. As to the personal hygiene issue, again there was a lot of conflicting testimony. Clearly there were a lot of complaints about complainant's personal hygiene when she was on PHN, as well as some while she was in the float pool. There also were many witnesses who said they didn't perceive any problems with her personal hygiene. However, one of respondent's witnesses was a co-worker with complainant on PHN, RN Lani Dordel, with whom complainant said she had had a good relationship. She was very emphatic in her testimony that complainant had a problem with body odor, and said she had explicitly brought this up with her. Complainant said she did not recall such a conversation, and expressed bewilderment at Ms. Dordel's testimony. She suggests that Ms. Dordel might have been influenced by others comments. However, on the basis of Ms. Dordel's testimony and overall demeanor, this suggestion is speculative.

It is possible that some of the discrepancy concerning the question of complainant's personal hygiene could be attributable to the fact that complainant was on PHN in hotter weather, and that she was working a lot of double shifts where she had a limited opportunity to bathe between shifts, as she pointed out. Again, complainant has the

ultimate burden of proof, and she did not establish that respondent's articulated concerns about her personal hygiene were a pretext for sexual orientation discrimination.

The complainant also raised some questions about the validity of some of the criticisms of her performance. For example, she testified that on the occasion when Mr. Schloskey reported that she had been involved in personal calls while on duty, she actually had been talking to a DHFS attorney about a work-related case, but Mr. Schloskey had never asked her about the call. However, as to most of the management concerns about which she testified, she did not establish that management did not have a reasonable basis to rely on feedback it was getting from other staff where she worked. For example, complainant testified as follows with regard to one of the problems management perceived in the security area:

As for the safety and security, everybody tended to get into their own roles. Like when a patient became violent and you had to pull him down, everybody had things that they were better at, and with me, since I'm not a real physical person, I was always the person who ran and got the restraint bag. So when things started to get acute, it wasn't that I was avoiding the situation, I would stand by the door and wait to go get the restraints.

The Commission can not conclude on the basis of this testimony that management's expressed concern about security issues was pretextual.

With regard to the harassment issues in this case, the July 27, 2001, ruling on the scope of the issues includes the following:

In *Al Yasiri v. UW (Platteville)*, 98-0110, 0129-PC-ER, 7/10/01, the Commission discussed the conduct encompassed by the hostile environment analysis. The Commission noted that many factors are pertinent when determining whether conduct constitutes actionable harassment and quoted with approval the following language from *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806-07:

[S]exual harassment is actionable under Title VII only when it is sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' *Meritor Sav. Bank*, 477 U.S. at 67, 106 S. Ct. at 2405, quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). Whether the harassment rises to this level turns on a constellation of

factors that include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283, 141 L.Ed.2d 662 (1998). We also assess the impact of the harassment upon the plaintiff’s work environment both objectively and subjectively. The work environment cannot be described as “hostile” for purposes of Title VII unless a reasonable person would find it offensive and the plaintiff actually perceived it as such. *Faragher*, 118 S. Ct. at 2283, citing *Harris*, 510 U.W at 21-22, 114 S. Ct. 370-71.

The question of whether the alleged conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment is a different standard than that of whether a discrete act by the employer constitutes an "adverse action." Therefore, while an adverse evaluation, standing alone, is not considered an adverse action, *see, e. g., Lutze v. DOT*, 97-0191-PC-ER, 7/28/99, in this case it is part of a combination of actions that complainant asserts amounted to harassment, and can not be considered in the abstract or in isolation.

Having heard the evidence on the allegations of harassment, the Commission now must evaluate these issues on the basis of the facts found after the hearing.

Much of complainant’s perception of harassment ran to disagreement with respondent’s evaluation and criticism of her performance, and does not fall within the concept of harassment per se, but are subsumed in the issue of whether respondent’s decision to terminate complainant’s probationary termination was based on a discriminatory motivation. For example, complainant’s fourth allegation of harassment is “I now felt that this review itself was harassment as I felt that a supervisor should help preserve my rights to a harassment free workplace, instead of incorporating personal opinions, and unsubstantiated, cruel comments into my review.” The Commission has concluded that respondent’s expressed reasons for her termination were not a pretext for discrimination on the basis of sexual orientation, and it is implicit in that conclusion

that her evaluations were not based on her sexual orientation. There is no basis on which to conclude that this performance evaluation was an act of harassment directed at her because of her sexual orientation.

With regard to the other incidents of alleged harassment, the additional statements set forth in allegation #1¹⁰ were not supported on a factual basis by evidence in this record. In any event, there is no basis for a conclusion that the matters raised by Ms. Janikowski in the PPD meetings were not raised by her in good faith, but rather were motivated by discriminatory considerations. With regard to allegation #2¹¹, the issue of personal hygiene was not raised by respondent without a reasonable basis for concern based on the reports and personal observations on which management relied, as discussed above. There was no evidence that the signs were placed by management. As to allegation #3¹², the issue involving management's position that complainant was discussing sexual encounters as opposed to her lifestyle or sexual orientation was discussed above. The evidence on this point was conflicting, and complainant did not sat-

¹⁰ "Some of the most hurtful things on this review were those things that were an attack on my personal character. It was stated on the written review that I was a poor role model for the patients, that I had bad personal and dental hygiene, body odor, oily hair, etc. But the additional statements that were not part of the written report. Joni [Janikowski] stated that it was reported to her by an unnamed person that I had left a sanitary pad in the waste can, in the employee restroom, unwrapped. She also stated that I had been seen leaving the rest room with what was believed to be feces on my hands."

¹¹ "I also became aware that the newly placed signs in the restroom were for my benefit.

The sign in the bathroom about hand washing was moved and amended. I was now starting to feel as if someone was "listening" while I was in the restroom and started to use the facilities off the unit as much as possible."

¹² "Jonni's closing comment that I was never again to mention my sexual orientation on the unit, as some of the employees found it offensive. She then stated that it was told to her that I had been sitting in the day room with other staff (with patients nearby) when I was asked by one of them (staff) if I was married. It was alleged that I said "no, I prefer women." I told Joni that this never happened, but I don't think she believed me. While I was told during the review not to mention my family on the unit, I still could hear the other unit employees socializing and discussing their families (and occasionally even their sex lives) while at work in the nurses station and out on the unit. I entered the nurses station and there was Jonni, the very person who said we were not to discuss our families at work, talking with the staff about her son's upcoming court date. During this review I was also told to keep careful track of my break times so that I would not be late. This rule was also obviously just for me as other employees often returned late from their breaks without reprimand."

isfy her burden of proof to establish that Ms. Janikowski's comments were as she alleged. The record does not support complainant's allegation that other employees overstayed their break times without management criticism, and in any event, as a probationary employee, complainant was subject to more exacting scrutiny than other employees with permanent status. With regard to allegation #4¹³, this is essentially part of the issue concerning complainant's disagreement with Ms. Janikowski's evaluations and ultimate termination decision, and has been discussed above. Allegation #5¹⁴ has been considered under the heading of pretext, and the Commission has concluded that the reason only one session occurred was logistical and related to the schedules of complainant and Ms. Janikowski. There was no discrimination here, either in the context of the circumstances surrounding complainant's termination, or viewed as a charge of harassment. The factual basis for allegation #6¹⁵ was not supported by evidence in the record, nor was it for allegation #7¹⁶

¹³ "I now felt that this review itself was harassment as I felt that a supervisor should help preserve my rights to a harassment free work place, instead of incorporating personal opinions, and unsubstantiated, cruel comments into my review."

¹⁴ "Also I only had one meeting with Jonni during the entire month [July 1998] to discuss my progress. It lasted approximately three minutes. Jonni asked me what feedback nurses had been giving me and I said none. She then stated that nothing had been reported to her either and that was the end of the meeting."

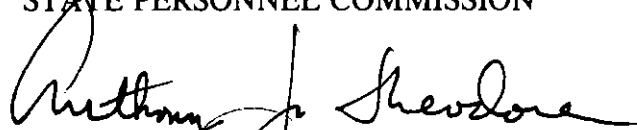
¹⁵ "One shift I received a phone call from my daughter's social worker while I was at work. I talked to her briefly and went back to work. I thanked the nurse on duty for letting me take the call and explained that it was a hospital social worker about my daughter. The nurse then told me that even though I was speaking with another hospital employee that this was considered a personal phone call and that from now on I would have to talk to her during my lunch break from a pay phone. I related this to the social worker who told me that she had never heard of such a thing before."

¹⁶ "I found out over the weekend that I needed to go to court with my daughter the following Monday. Since Jonni was not working that weekend I contacted the nursing supervisor (Darleen Kemp) on duty who contacted scheduling for me on my behalf and gave me permission to come in late that day. When I went to work that Monday I arrived well within the amount of time I had been granted and assumed all was well. Later that day a staff member who seemed as if they were trying to help me, warned me that Jonni had written up for being late. This seemed strange to me since Jonni was there when I came in late and never said a word to me. Two days later Jonni had me fill out a leave slip and I told her I had already completed one when Darline had granted me the time off. She told me to fill it out anyway so I did. Later

ORDER

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

Dated: May 29, 2002 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

AJT:990038Cdec1.2


KELLI S. THOMPSON, Commissioner

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

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition

when I heard that Jonni was still pressing the issue of my absence I talked directly with Darline who apparently straightened this matter out as this was the last I heard of it."

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