

STATE OF WISCONSIN

PERSONNEL COMMISSION

**LUELLA E. VINES,**  
*Complainant,*

v.

**President, UNIVERSITY OF WISCONSIN  
SYSTEM (PARKSIDE),**  
*Respondent.*

RULING ON MOTION

Case No. 99-0044-PC-ER

This is a complaint of disability discrimination relating to certain incidents of alleged harassment and to an alleged failure to accommodate. On July 6, 2001, respondent filed a motion to dismiss for untimely filing. The parties were permitted to brief this motion, and the schedule for doing so was completed on August 15, 2001. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. This complaint was filed with the Commission on March 15, 1999.
2. The report of the February 5, 2001, prehearing conference in this matter sets forth the following statement of issue for hearing:

Whether there is probable cause to believe that complainant was harassed by respondent because of her disability with respect to the following:

- 1). On numerous occasions between January 1, 1997 and April 19, 1997, Takata allegedly required complainant to re-write her position description, write the history of her tenure in the Department of Sociology & Anthropology, respond to her 1996-97 performance evaluation and give herself a grade, and develop goals and objectives for the 1997-98 evaluation period;
- 2). On April 15, 1997, Takata allegedly told complainant she was subject to progressive discipline if she did not complete the assignments noted in 1);

3). On March 6, 7, 10 and 13, 1997, Takata allegedly had complainant take off time because a limited term employe was available to cover the office; and

4). On April 18, 1997, Takata and complainant met about her position description and position history and Takata expressed dissatisfaction with the product that complainant produced.

Whether respondent failed to reasonably accommodate complainant's disability in 1997-98 after her return to work in August of 1997

3. Although additional incidents of harassment were alleged by complainant and investigated by the Commission, complainant failed to appeal the No Probable Cause determination as to these additional incidents.

4. Complainant was on sick leave the first weeks of May of 1997, and was then on medical leave from May 14 through August 25, 1997. On August 25, 1997, complainant returned to work half time through January 2, 1998; three-fourths time through January 16, 1998; and full time thereafter.

5. Complainant alleges that her harassment by Takata was one of the factors precipitating her need for sick leave/medical leave starting in May of 1997

6. Complainant underwent an Independent Medical Examination (IME) on November 12, 1997, by psychiatrist Donald L. Feinsilver, M.D. Dr Feinsilver concluded as a result of this IME that complainant had bipolar disorder and stated as follows, as relevant here, in the report he provided to respondent on or around November 28, 1997:

I would also offer the suggestion that the diary of her work performance not become so extravagant as to define her as a unique individual or place undue (sic) pressure on her.

I would suggest that excessive and complicated interpersonal interactions or unusually stressful interpersonal interactions be avoided. This, in a sense, is an accommodation.

I would simply avoid projects that are overwhelming, require a great deal of time or perhaps overtime, or would put her in a position of having many people being critical of her or making contradictory demands (unfortunately this is frequently a workplace stress and a not uncommon event).

Additionally, I would suggest that by way of accommodation, Ms. Vines be given time off if it appears that she is entering a period of "mood swings."

...

I would suggest that it might not be inappropriate for at least some period of time to have her doctor be sending brief notes to work that she is progressing satisfactorily in treatment (assuming that is the case).

Performance expectations should be reasonable. She certainly should be expected to perform adequately on her job; however, it would not be wise to place her under great pressure by making excessive performance demands with which she would have difficulty complying.

7 In a memo to complainant dated December 8, 1997, Richard Cummings, respondent's Human Resources Director, stated as follows, as relevant here:

I will schedule a follow-up meeting with you, Renee Kirby, Susan Takata [Chair of the Department of Sociology and Anthropology and complainant's first line supervisor], and William Streeter [Vice Chancellor for Fiscal Affairs] to discuss your current and any future accommodations that you may need, consistent with Dr. Feinsilver's recommendations.

Complainant contends that this meeting never took place.

8. On February 2, 1998, complainant met with Kirby and Takata. A document discussed at this meeting states that respondent was providing complainant the following disability accommodations:

..weekly memos outlining work priorities, weekly meetings with supervisor and other university employees, the supervisor [Takata] having to share her office and personal computer with the full-time LTE whenever the employee [complainant] was working at the front desk.

9. On August 26, 1998, complainant transferred to a position in another department.

#### OPINION

Section 111.39(1), Stats., requires that a charge of discrimination brought under the Wisconsin Fair Employment Act (FEA), such as this one, be filed no more than 300 days after the alleged discrimination occurred. This complaint was filed on March 15,

1999. As a result, the actionable period under the FEA is May 19, 1998, through March 15, 1999. Complainant has the burden to show that the allegations at issue here were timely filed. *Nelson v. DILHR [DWD]*, 95-0165-PC-ER, 2/11/98.

Accommodation Issue

Complainant was certainly aware after the issuance of Dr. Feinsilver's report on November 28, 1997, whether she was being provided the accommodations he had recommended. However, complainant contends that she was led to believe by Cummings' memo (See Finding 7, above) that, even though not all the recommended accommodations were being provided at that time, further accommodations were under consideration and that she would be included in a meeting with Cummings, Kirby, Takata, and Streeter to discuss this. Complainant argues that this alleged failure by respondent to finalize its decision relating to the accommodations to be provided to her operated to toll the statutory filing period. *See, e.g., Tafelski v. UW-Superior*, 95-0127-PC-ER, 3/22/96 (appropriate to apply continuing violation doctrine where it is difficult to pinpoint the exact violation date due to the involved decision-making practices of the employer, citing *Selan v. Kiley*, 59 FEP Cases 775 (7<sup>th</sup> Cir. 1992)). Although certainly, at some point in time, it would no longer have been reasonable for complainant to expect that such a meeting was still planned, it is not apparent from the available information what that point in time should have been. It should also be noted that respondent contends that a series of meetings occurred after Dr. Feinsilver's report and Cummings' memo were issued, and that complainant should have been aware as the result of these meetings of the nature of the accommodations respondent intended to provide her. At this point in these proceedings, without an evidentiary record upon which to rely, it is not possible to resolve the underlying factual dispute in this regard, and it would be inappropriate, as a result, to dismiss the accommodation issue for lack of timely filing. *See, Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98.

### Harassment Issue

None of the incidents of alleged harassment still at issue here occurred during the actionable period. Complainant contends, however, that they are rendered timely by operation of the continuing violation doctrine.

In cases such as this, where the complainant alleges a pattern of harassment, the Commission has applied the continuing violation doctrine if at least one of the actions falls within the statutory time period and as long as there is not a sufficient length of time between actions to 'break the chain' which links the pattern of actions together *Kortman v. UW-Madison*, 94-0038-PC-ER, 11/17/95; *CaPaul v. UW-Extension*, 92-0225-PC-ER, 1/27/93. Here, however, none of the incidents of alleged harassment which remain at issue fall within the actionable period. Although complainant argues that this type of harassment continued into the actionable period, and that she included within her charge of discrimination harassment allegations relating to incidents which occurred during the actionable period, such argument is unavailing since complainant has opted here to include within the ambit of the remaining harassment issue only certain allegations and none of these allegations relates to an incident which occurred during the actionable period.

Complainant argues that the "anchor" for her remaining harassment allegations within a continuing violation analysis is the failure of respondent, during the actionable period, to fulfill its duty of accommodation. In order to sustain a continuing violation, however, the "anchor" incident must be of the same type as the incidents which fall outside the actionable period. *Selan, supra*; *Tafelski, supra*. In *Selan*, for example, the actions at issue all related to taking responsibility away from the plaintiff and were, as a result, concluded to be the same type of action. In addition, the incidents under consideration must be offered pursuant to the same theory of discrimination, i.e., the acceptance of one theory of discrimination during the actionable period cannot be used under the continuing violation doctrine to "bootstrap" prior claims brought under an unrelated, separate discrimination theory. *Tafelski, supra*, at 22-23. See, e.g.,

*Jensvold v. Shalala*, 62 FEP Cases 1177 (DC MD, 1993), where the court found one unequal treatment incident during the actionable period and refused to apply the continuing violation doctrine to encompass prior alleged acts of harassment because such claims were “factually and legally distinct.” Here, the failure to accommodate allegation not only relates to a different type of incident than the harassment allegations, but is offered pursuant to a different type of claim, consistent with the analysis in *Jensvold, supra*.

Finally, the continuing violation doctrine is applied to toll a limitations period when an employee would have had no reason to believe she was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 50 FEP Cases 1474 (7<sup>th</sup> Cir. 1989); *Tafelski, supra*. Here, however, complainant has alleged that she took the medical leave which commenced in May of 1997 at least in part because of her harassment by Takata. As a result, complainant appears to be acknowledging that, no later than May of 1997, which falls well outside the actionable period, she had formed a belief that she was being harassed by respondent. This would also militate against the application of the continuing violation doctrine to complainant’s allegations of harassment. *See, Ochrymowycz v. UW*, 99-0161-PC-ER, 6/7/00.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to 230.45(1)(b), Stats.
2. Complainant has the burden to show that the subject allegations were timely filed.
3. Complainant has sustained this burden in regard to the accommodation issue, but has failed to sustain this burden in regard to the harassment issue.

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ORDER

Respondent's motion to dismiss is granted in part and denied in part, consistent with the above. The only issue remaining is:

Whether respondent failed to reasonably accommodate complainant's disability in 1997-98 after her return to work in August of 1997.

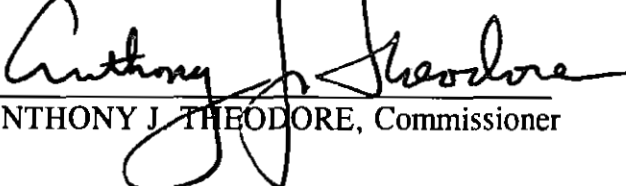
Dated: September 5, 2001

STATE PERSONNEL COMMISSION

  
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LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

  
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ANTHONY J. THEODORE, Commissioner