

STATE OF WISCONSIN

PERSONNEL COMMISSION

AVELINO T. PONTES,
Complainant,

v.

**Secretary, DEPARTMENT OF TRANS-
PORTATION,**
Respondent.

FINAL DECISION AND
ORDER

Case No. 99-0086-PC-ER

NATURE OF THE CASE

This matter is before the Commission following the promulgation of a proposed decision by the hearing examiner pursuant to s. 227.46(2), Stats. The Commission has considered the parties' objections and arguments, and now adopts the proposed decision and order as its final disposition of this case, with a few minor changes. Changes are explained by alphabetical footnotes.

This case involves a claim of discrimination under the WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats.). The issues for hearing are as follows:

1. Whether respondent discriminated against complainant in violation of the WFEA on the basis of race, color, or national origin with respect to a) his probationary termination, or b) the alleged forgery of complainant's signature on certain time sheets.

2. Whether respondent retaliated against complainant in violation of the WFEA with respect to complainant's probationary termination, because of his alleged complaint that other employees in his work unit whose job performance was just like complainant's were not terminated. (Conference report dated August 8, 2000).

FINDINGS OF FACT

1. Complainant is black and a native of Guinea. He has a BS in Mechanical Engineering and Statistics.

2. Complainant was appointed to an IS (Information Systems) Programmer/Analyst--Intermediate position effective December 7, 1998, in the Department of Transportation's (DOT's) Bureau of Automation Services. This appointment was via an interdepartmental transfer from the Department of Health and Family Services (DHFS), subject to a six month permissive probationary period.

3. Complainant was interviewed and hired by Steve Borth, an Information Systems Supervisor 2, and the immediate supervisor of the position in question. The position from which complainant transferred was not in the same classification as the position in DOT, but was in the same pay range. Before meeting with Borth, complainant had filled out a form on which he had rated himself on his education, training, and work experience with regard to a number of aspects involved in the DOT position--e. g., specific programming languages, operating systems, etc., Respondent's Exhibit R1. Borth reasonably relied on this information in deciding complainant should be able to do the work involved in the new position, and that it was appropriate to appoint complainant at the intermediate (versus the entry level) for the classification in question.

4. One of the items on Respondent's Exhibit R1 is "IBM or compatible mainframe." Complainant identified the following category for this item under "EDUCATION OR TRAINING EXPERIENCE": " B. I have informal training on performing tasks or activities using this tool or technology (e. g., self-taught, personal reading and research, etc.," and under "PROFESSIONAL WORK EXPERIENCE": "C. I have performed tasks or activities independently (without assistance) using this tool or technology."

5. At the time he approved hiring complainant, Borth knew complainant did not have IS work experience, and had not done file handler or batch testing, but he did not have the opinion that complainant had no background (i. e., no education, training, or work experience) in mainframe computers.

6. On December 14, 1998, complainant and Borth signed the first page of a "PERFORMANCE, APPRAISAL & DEVELOPMENT REPORT," Complainant's Exhibit 1, p. 2. This document includes the following:

PERFORMANCE GOALS: (What the employee should accomplish)

A. Direct and/or assist in the strategic development and implementation of complex departmental information technology systems.

B. Perform data and application administration functions in support of the corporate data and application architectures.

C. Perform consulting and technical support services.

PERFORMANCE EXPECTATIONS: (Standards to which employee is expected to perform)

A1. Perform lead analyst/programmer functions on complex information technology systems.

A2. Perform project leader work as opportunities exist, including development of planning reports and project proposals.

A3. Participate in design and structure of systems requiring interaction with customers/organizations outside the primary application area.

A4. Recognize and integrate new technologies into business solutions.

B1. Assist in the development and maintenance of data models and application architecture design.

B2. Ensure security and consistent inventory of data models and architectures.

C1. Keep abreast of new technologies, and share this knowledge with the application area.

C2. Assist customers in support of automation methods and tools.

7 Immediately above the signature lines on this document is the statement: "The above Goals, Expectations and Training Courses have been discussed and we mutually agree they are realistic, qualifiable, quantifiable and timely."

8. Darren Powers is an employe within the bureau who was assigned to act as a mentor for complainant with regard to certain programming languages. He was involved in

that capacity on the complainant's first assignment--the NCOA project. He also was the project leader on complainant's fourth assignment, the PFUNC project.

9. Complainant's first project (NCOA) was assigned December 7, 1998. Catherine^A Puisto, another co-worker, was the team leader for this project. Ron Jacobson was another co-employee in the bureau who was supposed to act as a technical resource to complainant on this project.

10^B.A. The NCOA project was relatively simple, and should have been relatively easy for complainant to have done.

10.B. This project was assigned to complainant on his first day of work--i. e., December 7, 1998. The original due date was established as January 10, 1999. On December 18, 1998, the due date was changed to December 28, 1998, due to a change in the project which eliminated about half of the work involved.

10.C. Borth and Puisto discussed this change in a December 16, 1998, exchange of emails in which Puisto advised Borth that the NCOA (first) project had been essentially reduced by half when she learned that one of the expected modifications to the project would no longer be needed. She then stated:

This greatly reduces the amount of work involved in the project. The deadline should not be a problem. I do still need to talk to Avelino to assure that he knows that we still want the deliverables which are pertinent to the portion of the project which is for the processing of the incoming file. To date I have not received any of the deliverables on the tasklist. Complainant's Exhibit C10, p. 14.

Borth responded to this email as follows: "Thanks for the update, Catherine. Let's keep the expectations high for Avelino; maybe we can get this done sooner than we had expected." *Id.* In a subsequent email sent by Puisto to Borth on or about December 18, 1998, Respondent's Exhibit R4, p. 28, she enumerates a number of performance issues she has encountered with complainant, and it includes this statement: "Based on your message to 'keep the expectations high' I feel justified in what I've asked for."

^A The first name of Ms. Puisto is corrected to correct an error.

^B This finding is subdivided for purposes of clarity.

10.D. This reference to expectations involves the fact that when complainant started on the job, both Puisto and Borth assumed that he would be working at a normal pace under the circumstances. After the emergence of question marks surrounding complainant's performance capabilities, management had to consider whether they should lower the expectations for complainant. Specifically, Puisto was dealing with a situation where the extent of complainant's first assignment (NCOA) had been reduced by about half due to a change in the project, she was having problems getting any responses to her requests from him (no deliverables had been received), and it had to be decided whether to assume he would not be able to complete the project, and whether to downgrade the expectations and deadlines.

10.E. Borth decided not to do so, and this appears to have been a reasonable decision in light of the fact that complainant was hired at the intermediate level, based on his representations about his background, and was expected to perform normal tasks for such a position, and should have been able to have completed the assignment in less time than originally had been estimated due to the reduction in the size of the project. Complainant actually completed the project about January 16, 1999, which was 19 days after the projected completion date.

11. Complainant's work on this project was inadequate, for a number of reasons. His interaction with the project leader (Puisto) was problematic. He failed to follow her directions with regard to keeping her abreast of his progress. He was supposed to follow a checklist and let her know when he completed a task, but he did not provide very much of this communication. He also failed to consult with the personnel who had been assigned to help him, and spent a good deal of time with other developers, on whom he relied excessively to complete the necessary coding. Complainant demonstrated difficulty understanding and executing the coding using the programming languages involved. Borth discussed with complainant his performance issues on this project when they met on January 29, 1999, in connection with complainant's interim probationary report (see Finding 13, below).

12. Because it became apparent soon after he started work that complainant's knowledges, skills, and experience were less than Borth had assumed when he hired complainant, and that complainant's performance was problematical, Borth began keeping a detailed log concerning complainant's progress, Respondent's Exhibit R4. It was unusual for Borth to have

done this, but complainant's knowledge and performance levels were significantly lower than any of the other employees under Borth's supervision during the time period of complainant's employment in the unit. While complainant felt that Borth was keeping this log was part of a concerted, discriminatory effort by Borth to ensure that complainant did not pass his probation, under the circumstances it was a reasonable and prudent measure by Borth.

13. On January 29, 1999, Borth met with complainant and reviewed in detail the problems with complainant's performance. Both signed an "Interim Probationary Evaluation," Respondent's Exhibit R5.

14. Complainant's second assignment (Print Pot), assigned February 1, 1999, was a very simple assignment to review and analyze a paragraph of code. Complainant relied on another programmer for help in completing this project, and never provided an indication that he understood the problem associated with the project. Complainant met with Borth on February 4, 1999, and he reviewed the project with complainant and explained the problems with his work.

15. Complainant was assigned his third project (VINPolk/SUV) on January 22, 1999. This was to modify the title/registration system to recognize sport utility vehicles as a new vehicle type. After consultation, both his PL (project leader) and his mentor agreed that the project was beyond complainant's capabilities, and it was reassigned before complainant was asked to proceed with it.

16. The fourth project (PFUNC) was assigned February 4, 1999. It involved simple coding. Including testing, the time estimate management reasonably projected for this project was 55 hours. It took complainant 120 hours to complete it, which was an excessive amount of time. The project would not have been adequately completed without direct input from his supervisor regarding the process of promoting the code to the production environment. Complainant could not adequately explain the purpose of the program to his supervisor in a post-completion "walkthrough." The supervisor discussed complainant's performance problems with him.

17 The fifth assignment (Late Renewal Printing), assigned on February 22, 1999, involved work at a basic level. The time estimate respondent reasonably projected for the

completion of this project was 40 hours. Work was discontinued on this project after 56 hours, when complainant ascertained that the Y2K team was modifying one of the programs he would have needed to have completed the project. Management reasonably concluded that even if he had the missing material, he would have substantially exceeded the time estimate for this project. His supervisor discussed with complainant the excessive amount of time he had taken to complete this project.

18. The sixth assignment (Transaction Count Report) involved relatively basic coding. This project was developed specifically to evaluate complainant's capabilities, because of the poor performance complainant had exhibited to that point. The project was assigned on March 12, 1999, with a reasonable projected completion date of April 2, 1999. Complainant completed it on April 16, 1999. In addition to taking an excessive amount of time to complete the project, complainant failed to follow instructions. He had been told to complete the design and have it approved before beginning any program coding. He ignored this directive and began coding immediately, resulting in his having coded two programs by April 5, 1999, even though the design had not yet been reviewed and approved. Also, his supervisor gave him a specific list of needed materials, but complainant did not assemble all of the specified pieces. His supervisor discussed with complainant his performance problems during the course of the assignment.

19. The seventh project (Education Test Records), assigned March 12, 1999, involved complex analysis and programming. It was given to him because complainant had requested a project that would challenge his capacity and prove something about his capabilities. After discussions about the project with complainant, management reasonably determined that complainant did not have the capabilities to do this work, and the project was never completed.

20. The eighth project (U Haul Report), assigned April 12, 1999, was very simple. Complainant completed this project in a reasonable amount of time. Management provided feedback to complainant on his work on this project.

21. The ninth project (Plate Configuration Changes) was assigned April 26, 1999. It involved changing a program to allow new license plate configurations for several plate types. This assignment was of average complexity. Complainant's work on this program was

unsatisfactory. He completed the first part of the assignment with assistance. He made a basic mistake ("On initial compile of program, [he] was not aware that he recompiled the production version of the program rather than his own," [Complainant's Exhibit C1, p. 12]) that should not have happened in light of his five months' experience in the job at that time. The second part of the project was reassigned after both the PL and complainant's mentor agreed that the time it would have taken someone to assist complainant to complete the second phase of the project would have been significantly more than it would have taken someone else to simply do the project on their own.

22. Following this project, Borth terminated complainant's probationary employment, effective May 22, 1999, and subsequently he was replaced by a white person not of foreign origin. Borth advised complainant of his decision on May 7, 1999, as set forth below in Finding 24.

23. Borth's final performance summary for complainant as set forth in complainant's "Performance, Appraisal & Development Report, dated May 7, 1999 (Complainant's Exhibit C1, p. 6) is as follows:

[Complainant's] efforts since his hiring have been determined, but his overall performance never reached normal, expected standards. He was given multiple opportunities, and experienced a wide range of application development situations, but due to several factors he was not successful in meeting the expectations of the position. Because these problems began showing up soon after his hiring, he was immediately assigned a mentor/coach who could work closely with him. In addition, he was given every opportunity to take classes to augment his skills. Even with this immediate and on-going attention, [complainant] was still making critical mistakes 5 months into his probationary period. More distressing was that he was unaware of the errors he was making, and denied having any problems. This led to a difficulty in taking any corrective action. As a result, his work continued to be unsatisfactory, to the point that the decision was made to terminate his employment at the end of the probationary period.

Borth's assessment of complainant's performance was accurate.

24. Borth met with complainant on May 7, 1999, to inform him he would not be passing probation. Complainant requested the presence of a conciliator. Borth denied the request because he believed that there was no good reason for one, and that it would only unnec-

essarily delay matters if this were to have been pursued. After Borth told him of the termination, complainant became agitated, angry, and stormed out of the workplace. Under the circumstances, which included complainant's access to the DOT computer system at his work station, Borth reasonably was concerned about complainant acting out, or some other untoward act on complainant's part. He called the capitol police to ascertain that complainant had left the work site, directed that complainant remain off the work site, and that his personal belongings be mailed to him.

25. Because complainant's termination was not effective until May 22, 1999, but complainant was not at work, in order to facilitate complainant getting paid, Borth prepared time sheets for complainant (Respondent's Exhibit R 8). Borth signed complainant's name along with Borth's initials. It was standard practice for Borth to fill out time sheets in this way when employees were not available to sign their own time sheets. He did not "forge" complainant's name. Borth was under the belief based on information from the payroll coordinator, that since complainant was not at work, he would have to use vacation time to get paid, and so Borth attributed the time to vacation. Subsequently, someone in the human relations office advised him that that was incorrect, and to use regular work time for this period rather than vacation, and this was done. Complainant was paid for the period of May 7-22, 1999, and never wound up being charged vacation time for this period.

26. Complainant did not establish there were other probationary employees under Borth's supervision, who were similarly situated to complainant, who Borth treated differently from him. Borth earlier (May 4, 1998) had terminated the probationary employment of a white employee, not of foreign origin, whose work had been unsatisfactory. Complainant's Exhibit C12, p. 8.

27. Complainant sent a March 22, 1999, letter to Borth (Complainant's Exhibit C2, pp. 2-3), in which he complained about a number of aspects of his employment. Complainant made some statements about being treated differently:

At the beginning I felt all employees were treated equally. All of a sudden things have changed and I found myself under intense and minute scrutiny.

My feeling is that I have not been treated like other employees.
Please do not single me out. Involve me like any other employee, treat me like the other employees

Complainant did not attribute any of the things about which he was complaining to any form of WFEA discrimination--e. g., race, color, or national origin.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proof to establish by a preponderance of the evidence the facts necessary to establish that respondent discriminated against him as he alleged.
3. Complainant did not satisfy his burden of proof.
4. Respondent did not discriminate against complainant in violation of the WFEA on the basis of race, color, or national origin with respect to a) his probationary termination, or b) the alleged forgery of complainant's signature on certain time sheets.
5. Respondent did not retaliate against complainant in violation of the WFEA with respect to complainant's probationary termination, because of his alleged complaint that other employees in his work unit whose job performance was just like complainant's were not terminated.

OPINION

The first issue for hearing is as follows:

1. Whether respondent discriminated against complainant in violation of the WFEA on the basis of race, color, or national origin with respect to a) his probationary termination, or b) the alleged forgery of complainant's signature on certain time sheets.

The Commission will first address the issue concerning the probationary termination.

Puetz Motor Sales, Inc. v. LIRC, 126 Wis. 2d 168, 376 N. W. 2d 372 (Ct. App. 1985); *review denied*, 126 Wis. 2d 519, 378 N. W. 2d 292; sets forth the basic framework for analysis of a discharge case under the WFEA.

The basic allocation of burdens requires the complaining party to establish a *prima facie* case, which then raises a presumption of discrimination. To rebut the presumption, the defendant need only articulate a legitimate, non-discriminatory reason for the action taken. The complainant then must be given the opportunity to prove that the proffered reason is merely a pretext for discrimination.

The elements of a *prima facie* case will vary with the factual circumstances of each case. In a claim of discriminatory discharge the complainant must show that (1) he was a member of the protected group under sec. 111.33, Stats., (2) he was discharged, (3) he was qualified for the job, and (4) either he was replaced by someone not within the protected class or others not in the protected class were treated more favorably. 126 Wis. 2d at 172-73 (citations omitted)

In this case, the complainant, Avelino Pontes, has established that he is a member of groups protected on the basis of race, color, and national origin, that he was discharged, and that he was replaced by a person not in the same protected groups. There is a significant question whether he was qualified for the job. However, if we assume that he did show that he met the minimum qualifications for the job, complainant's main basis for trying to show pretext is that his performance was not as bad as Borth asserts. Where the case has been tried fully, it is unnecessary to analyze whether a *prima facie* case has been established,¹ 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). Therefore, the Commission will assume the establishment of a *prima facie* case and move on to the rest of the analysis under *Puetz*.

Respondent's asserted rationale for terminating complainant's probationary employment is that complainant failed to adequately perform the duties and responsibilities of his job. As mentioned above, the main thrust of complainant's attempt to show pretext was to try to show

¹ An exception to this approach is where there is a missing element of a *prima facie* case which is also an essential element for establishing liability. For example, if a person has not established that he is at least 40 years old and thus covered by the WFEA age discrimination provision, §111.33(1), Stats., it is not possible for that person to establish an age discrimination claim even if the employer's proffered reason for its action were pretextual, and there normally would be no rationale for analyzing the question of pretext. *Al Yasiri v. UW-Platteville*, 98-0110-PC-ER, 98-0129-PC-ER, 7/10/01. [This citation has been added to the proposed decision to amplify the basis for the Commission's ruling.]

that Borth's evaluation of his work was not correct², and that he (Borth) fabricated these criticisms to provide a pretext for getting rid of complainant because of his race and national origin. In the Commission's opinion, complainant's efforts in this regard were unsuccessful.

Because of Borth's early concern about complainant's performance capabilities, he kept detailed, specific records of complainant's activities, which document that complainant's performance was inadequate for the level of position he held. Borth's perception of complainant's work was shared by other employees in the bureau who were familiar with complainant's work who testified in this case. Complainant tried to dispute the respondent's case, and to establish that he was performing adequately, and/or that the projects he was assigned were more complex or problematical than management contended, by his questioning of the witnesses³ and through his own testimony. However, the complainant has the burden of proof. With very limited exceptions⁴, complainant did not undermine the accuracy of the respondent's evidence. Complainant's case with regard to this point essentially boils down to, at best, a difference of opinion between himself on the one hand and Borth and the other employees in the bureau who provided evidence about his performance, on the other hand.

At some point during the middle of the hearing, complainant, concerned about the problems of proof he had been encountering, asked that the hearing be recessed while he tried to find an expert to study the projects he had been assigned, and to provide opinions about the projects and complainant's work on them. This request was denied by the hearing examiner.

² Another factor that enters into cases of this nature, is that the question before the Commission is whether the respondent deliberately discriminated against complainant on the basis of his race and national origin. Even if the respondent had been mistaken in some of the criticisms of complainant's performance, this does not necessarily mean Borth or others in management deliberately discriminated against complainant, although "the less support there is for the charges, the more likelihood there is of pretext." *Russell v. DOC*, 99-0086-PC-ER, 4/24/97 However, in this case the respondent had an adequate basis for termination of complainant's probationary employment, which was not shown to be a pretext for discrimination.

³ Complainant called a number of witnesses, but most of them had not worked with complainant, and/or were not in a position to provide an opinion about his performance.

⁴ For example, Complainant's Exhibit C1, p. 7, management's summary of assignments, shows that the PFUNC (fourth) project took 720 hours to complete. This is erroneous; the number of hours should have been 120. However, even 120 hours is more than twice the 55 hours that was estimated to complete the project.

In the Commission's opinion, this was an appropriate ruling. While complainant was unrepresented by counsel, he still had the ultimate responsibility to put his case together and to satisfy his burden of proof. The Commission notes that complainant conducted extensive prehearing discovery, and there were five on-the-record hearings held to deal with discovery and related issues. In the prehearing conference report, issued four months before the commencement of the hearing, the parties were explicitly advised that they had to submit names of witnesses and copies of exhibits at least three working days before the hearing pursuant to §PC 4.02, Wis. Adm. Code. Conference Report dated August 8, 2000. Furthermore, it is likely that complainant would have needed a substantial delay to locate an expert, have he or she become familiar with the issues in the case, and arrange to come before the Commission to testify.⁵

Complainant also refers to some evidence he argues is probative of bias on Borth's part. Complainant characterizes Borth's action of keeping a log of complainant's work performance as an effort to single him (the complainant) out and part of a discriminatorily motivated, concerted effort on Borth's part to ensure that complainant did not pass probation. However, Borth testified that the reason he decided to keep the log was because complainant's work at the beginning of his employment in the bureau was such as to raise a question about whether complainant would be able to do the job at an acceptable level of performance, and whether ultimately he would have to be terminated from employment before the completion of his probation. Under such circumstances, it was reasonable and prudent for management to have kept careful track of the employee's work, both to facilitate evaluation of his or her progress (or lack thereof), and to facilitate the respondent's ability to respond to a charge of discrimination, such as this. There was no need for Borth to have kept a log like this on other employees in the bureau, because their performance did not demonstrate problems similar to complainant's.

⁵ Complainant also raised the possibility of having some of the projects replicated as demonstrative evidence. In addition to difficulties (deleted data, etc.) in reproducing projects after the fact and lack of notice, such a demonstration would have been unlikely to have resulted in much probative evidence in the absence of an expert witness.

Another piece of evidence to which complainant refers is an email sent by Puisto⁶ to Borth on or about December 18, 1998. Respondent's Exhibit R4, p. 28. In this email, she enumerates a number of performance issues she has encountered with complainant, and it includes this statement: "Based on your message to 'keep the expectations high' I feel justified in what I've asked for " The reference in this email to Borth's message was to an earlier email exchange on December 16, 1998, in which Puisto first advised Borth that the NCOA (first) project had been essentially reduced by half when she learned that one of the expected modifications to the project would no longer be needed. She then stated:

This greatly reduces the amount of work involved in the project. The deadline should not be a problem. I do still need to talk to Avelino to assure that he knows that we still want the deliverables which are pertinent to the portion of the project which is for the processing of the incoming file. To date I have not received any of the deliverables on the tasklist. Complainant's Exhibit C10, p. 14.

Borth responded to this email as follows: "Thanks for the update, Catherine. Let's keep the expectations high for Avelino, maybe we can get this done sooner than we had expected." *Id.*

This reference to expectations involves the fact that when complainant started on the job, both Puisto and Borth assumed that he would be working at a normal pace under the circumstances. After the emergence of question marks surrounding complainant's performance capabilities, management had to consider whether they should lower the expectations for complainant. Specifically, Puisto was dealing with a situation where the extent of complainant's first assignment (NCOA) had been reduced by about half due to a change in the project, she was having problems getting any responses to her requests from him (no deliverables had been received), and it had to be decided whether to assume he would not be able to complete the project, and whether to downgrade the expectations and deadlines. Borth decided not to do so, and this was^C a reasonable decision in light of the fact that complainant was hired at the intermediate level, based on his representations about his background, and was expected to perform

⁶ Puisto served as project leader for some of complainant's assigned projects.

^C The term "appears to have been" is changed to "was" to clarify the decision.

normal tasks for such a position, and should have been able to have completed the assignment in less time than originally had been estimated due to the reduction in the size of the project.

This situation is related to complainant's assertion that Borth did not give him the benefit of a normal "learning curve" that would be associated with any new employee. However, Borth testified, and his testimony was supported by considerable other evidence, that management did provide complainant with ample time to have performed his assignments, encouraged him to consult with his mentors, supervisors, and project leaders, and in general tried to give him sufficient opportunity to demonstrate whether he could succeed in his job. Complainant was given a very basic coding assignment (Transaction Count Report, sixth project) that management specifically put together to serve as a means of evaluating complainant's capabilities. Another project (Education Test Records, seventh project) was assigned because complainant had asked for an assignment to "stretch" his abilities. Also, even after five months on the job, complainant was making errors in basic tasks. For example, the Plate Configuration Changes (ninth) project, elicited this comment from his supervisor: "On initial compile of program, [complainant] was not aware that he recompiled the production version of the program, rather than his own. After 5 months of work in this environment, that kind of mistake is unacceptable." Complainant's Exhibit C1, p. 12. In the opinion of the Commission, complainant was given a sufficient opportunity for a fair evaluation of his capabilities, even making allowance for any reasonable concept of a "learning curve."

Complainant contends that Borth at one point assessed his performance as improving, and that this is inconsistent with the conclusion reached by respondent that his work was not good enough to pass probation. This involves a point where Borth was considering the possibility of extending complainant's probation to maximize the opportunity for complainant to improve his performance sufficiently to pass probation. Borth had been informed that probation could only be extended under two circumstances--the employee's work had been good and got worse, or the work had been bad and was getting better. At that point, Borth indicated that for purposes of extending probation, complainant's work could be characterized as bad and getting better. The Commission does not believe this is significant evidence of pretext. Borth gave this indication in the context of discussing the possibility of extending complainant's probation,

and in connection with a desire to facilitate such an extension. Extension of probation would have been for complainant's benefit, because it would have given him even more time to try to demonstrate acceptable performance.⁷

Complainant did make some progress while he was employed at DOT. This was confirmed by the testimony of co-employees Ron Jacobson and Diane Booth. However, Jacobson also testified that complainant needed a significant amount of assistance from him, and that he would evaluate complainant as similar to an entry-level employee. Booth said she didn't work with complainant on any projects. She also said complainant was at the entry level with regard to COBOL and the mainframe environment, and that complainant's questions of her about COBOL were at the beginner's level. Also, Darren Powers testified that he told Borth that complainant was not coming to him as a resource, as complainant was supposed to have done. He also testified that, while the other newer people in the workplace were understanding the projects and doing OK, complainant did not understand even simple projects. He further said he would have been shocked to have known complainant claimed the level of expertise indicated on complainant's self-evaluation form (Respondent's Exhibit R1), and complainant definitely did not have this level of expertise. Puisto testified she didn't see much evidence of complainant working at the intermediate level, and that complainant frequently became agitated and upset when she asked him questions.

Complainant offers additional evidence of pretext through the testimony of Demetri Fisher, the DOT affirmative action officer who looked into complainant's May 18, 1999, letter (Complainant's Exhibit C3) to him complaining of having been wrongfully discharged. He said that it was unusual in his experience for DOT to bar an employee from the workplace when the employee was terminated. However, respondent points out that complainant was agitated and angry when Borth met with him to tell him about the termination. Borth also was concerned under the circumstances with complainant's access at the workplace to respondent's computer system, and the possibility of damage being done to that system. Under these cir-

⁷ In any event, the human relations office ascertained that because complainant was serving a permissive probation as a result of transfer, the civil service code would not permit the extension of probation anyway, and that potential option was ruled out.

cumstances, there was a reasonable basis for Borth's handling of the situation, which was unrelated to discrimination or retaliation.^D

Complainant also argued that Borth treated other probationary employees differently. However, he did not establish that their performance was comparable to his. There is no significant evidence that they had the same kinds of problems performing the work involved as did complainant.

Complainant contended that his work at DHFS prior to his transfer to DOT had been good. However, as Borth indicated, this assertion carries little weight, because the circumstances at DHFS, including the expectations of complainant's supervisor, are not known.

The second sub-issue in this case is whether respondent discriminated against complainant when he allegedly forged complainant's name on complainant's last time sheets. Borth did not "forge" complainant's signature; he signed complainant's time sheets with his (Borth's) initials next to the signature. This was a good faith effort by Borth, consistent with his normal practice, to facilitate the payment of complainant's salary. Borth was acting on the advice of the payroll coordinator when he attributed the time in question to vacation, and after he was advised by human relations that this was erroneous, he corrected the error. Complainant never had any vacation charged to his leave account, and thus there was no adverse employment action in connection with Borth's handling of the matter. An adverse employment action is an essential element of a WFEA discrimination complaint. *See Dewane v. UW*, 99-0018-PC-ER, 12/3/99. Furthermore, there is no evidence to create an inference of discriminatory intent by Borth.

With regard to complainant's retaliation charge, it is questionable whether complainant engaged in any activities protected by the WFEA prior to the termination of his probationary employment. Complainant sent a letter dated March 22, 1999, to Borth (Complainant's Exhibit C2, pp. 2-3), in which he complained about a number of aspects of his employment, and contended that he had been treated differently and singled out. He did not mention any protected basis--i. e., race or national origin--for the alleged different treatment. However, even assuming there had been such an activity, the Commission would conclude, for essentially the

^D The phrase "which was unrelated to discrimination or retaliation" is added for clarification.

same reasons discussed above, that respondent's rationale for terminating complainant's probationary employment was not a pretext for retaliation.

Finally, while the Commission has considered all of complainant's arguments, it has only addressed the ones that seemed most significant. Complainant cited many disagreements with respondent, and particularly with Borth, concerning his assignments and conditions of employment. However, this does not add up to any significant evidence of pretext. Borth ultimately reached the conclusion that, after making due allowance for complainant as an employee in a new environment, complainant had not shown the essential skills, knowledges and abilities needed to succeed in his position after five months on the job. This opinion was consistent with the testimony of the other witnesses of record who had worked with complainant. Borth's decision to terminate complainant's probation was not shown to have been a pretext for discrimination or retaliation against complainant.

ORDER

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

Dated: October 18, 2001.

STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. MCCALLUM, Chairperson

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Judy M. Rogers
JUDY M. ROGERS, Commissioner

Anthony J. Theodore
ANTHONY J. THEODORE, Commissioner

Parties:

Avelino Pontes
4906 Odana Road
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NOTICE

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

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

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehear-

ing 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