STATE OF WISCONSIN PERSONNEL COMMISSION

ANGELLA F. ELLIS,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

INTERIM
DECISION
AND
ORDER

Case No. 99-0066-PC-ER

This matter is before the Personnel Commission as a complaint of discrimination. The Commission convened a hearing on the following issues:

> 1. Whether complainant was discriminated against on the basis of disability when she was allegedly denied reasonable accommodation between June 14, 1998, and January 22, 1999.
>
> 2. Whether complainant was discriminated against on the basis of race or disability when she was terminated from her probationary appointment effective January 22, 1999.
>
> 3. Whether complainant was discriminated against on the basis of race or disability when she was allegedly harassed by respondent through letters and telephone calls to her home between December 14, 1998, and January 19, 1999.[1]

After the conclusion of the hearing, the parties filed written arguments.[2] In her post-hearing arguments, the complainant, who is represented by counsel, addressed her claims that respondent had discriminated against her based on her disability when they allegedly failed to accommodate her disability and terminated her employment. However, complainant failed to argue her race allegations and failed to argue that letters and

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[1] Issues 2 and 3 initially included claims of age discrimination but these allegations were withdrawn during the hearing.

[2] The Commission regrets the delay in issuing this decision. Due to the State's ongoing budget difficulties, the Commission has in effect been understaffed in its professional positions by 20% since May of 2000, 40% since February of 2002, and 60% since January of 2003. In addition, the Commission has had to relocate its offices and deal with many matters relating to the impending demise of the Commission pursuant to the budget bill, SB 44, s. 9139. These factors have contributed to the delay.

phone calls constituted harassment. The Commission considers complainant to have withdrawn those claims and will only address the claims that were argued.

After the examiner issued the proposed decision, the parties filed written objections. After consultation with the examiner, the Commission has modified the proposed decision as set forth below, to reflect a slightly different determination of the accommodation issue, and to effect certain minor changes in the language of the decision. The reasons for any significant changes are explained in alphabetical footnotes.

FINDINGS OF FACT

1. Complainant is a nurse.

2. Respondent operates Central Wisconsin Center (CWC) in Madison, a residential facility for highly dependent individuals. CWC is part of respondent's Division of Care and Treatment Facilities.

3. The CWC campus consists of 105 acres and includes 10 separate buildings (Resp. Exh. 103) of which 8 are residential buildings (Resp. Exh. 104). The maximum distance between two buildings is ½ mile. (Steele testimony)

4. There were approximately 425 residents at CWC during the relevant time period. More than 80% of the residents were non-ambulatory, i.e., they were totally dependent on others to move them into bed or onto a cart. Approximately 75% of the residents experienced seizures. More than 50% were fed via a stomach tube. Many of the residents had limited or no vision and/or hearing.

5. Residents weigh an average of 105 lbs., but the weight of the residents ranges from 40 to 160 lbs. (Krzizke testimony). The average cognitive age for residents is 9 months.

6. Underground tunnels connect many of the buildings. There are bicycles and motorized vehicles similar to small golf-carts that may be used to move within the underground tunnels.

7. The resident rooms in CWC's buildings are often very crowded in order to contain resident beds, furniture and medical equipment, including adaptive equip-

ment such as wheelchairs and scooters. It can be difficult to navigate through these rooms in order to access the residents.

8. Effective March 1, 1998, complainant was appointed to a position of Nursing Supervisor 2 at Central Wisconsin Center. Complainant's position served as a shift supervisor, or "charge nurse," and complainant was required to complete a 12 month probationary period at CWC.[3]

9. Part of the pre-employment physical examination for the position was walking with a 50 lb load.

10. Complainant's immediate supervisor was Kathlyn Steele, CWC's Director of Nursing.

11. Complainant had the responsibility to supervise the resident living programs, nursing programs and management services on evening (p.m.) and night shifts. Her duties included insuring the safety of residents and staff and the grounds of the facility.

12. Complainant's responsibilities were accurately reflected in her position description (Comp. Exh. 16, Resp. Exh. 102), signed on March 2, 1998.[4] The position description includes the following language:

> A. 45% Supervision of resident care and nursing services programs.
> A1. Complete rounds to all resident living units and special care unit to assess resident nursing or medical needs and make arrangements for the provision of these needs. . . .
> A3. Identify resident active treatment concerns, gather pertinent information, and collaborate with staff to resolve problems. Maintain communication with unit coordinators, nurse clinicians and service specialists as basis for decisions. . . .
> A5. Perform complex procedures, which must be performed by a R.N.; pass selected medications. . . .

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[3] The appointment letter, Resp. Ex. 101, incorrectly refers to the appointment as a promotion. (Steele testimony)

[4] The position description incorrectly referred to a 50% position rather than a 100% position. (Steele testimony)

B. 35% Supervision of nursing staff and resident care personnel in all units on assigned shift.

C. 20% Function as Administrative Charge Person.
C1. Represent CWC administration, assuming responsibility for all staff and activities, noting and resolving problems, and maintaining continuity of all necessary services.
C2. Assure that DH&SS and CWC policies and regulations are adhered to in the delivery of care and services during assigned shift. Interpret and explain policies when needed.
C3. Take direct action to meet emergencies within specific areas relating to fires, severe weather, or other environmental hazards affecting the safety of residents and staff. . . .
C7. Obtain medications from Pharmacy Stat Kit to meet immediate needs on units.

ABILITIES

- Ability to work from standing, sitting, kneeling or stooping position.
- Ability to stand and/or walk on hard tile floors for several hours a day.
- Ability to travel freely throughout CWC buildings, units and grounds.
- Ability to make pertinent visual observations.
- Ability to clearly hear residents, announcements, etc., and respond appropriately.
- Ability to respond quickly and appropriately in emergency situations based on written and verbal guidelines. . . .
- Ability to move about safely within work environment without putting yourself or others at risk.

The final pages of Resp. Exh. 102 list specific physical demands for the position and include the following summary:

> This position involves direct resident cares and activities. Physical job functions include: *Constant activities* (75%): standing; walking; bending at waist; use of both arms and legs; and working alone. *Frequent activities* (25-75%) include: squatting, kneeling, use of both wrists and fingers; lifting 55 lbs less than 15X/shift; push, pull and carry. *Occasional Activities* (less than 25%) include sitting; climbing stairs, supporting with arms or hands; 2 person lift (56-120 lbs); overtime work conditions; and working with moving vehicles.

13. Charge nurses routinely walk at least 3 miles per day[5] and routinely spend at least 5 hours on her/his feet during a shift. (Joseph testimony)

14. During both the p.m. and night shifts, the charge nurse conducts a room-by-room, bed-by-bed check of the residents and it normally involves actually looking at each resident. The charge nurse must physically interact with aggressive residents and, more frequently, with residents having seizures. The charge nurse must be able to quickly respond physically to emergency situations.

15. During 1998, there were 14 medical emergencies at CWC and 12 required an emergency 911 call. There were 3 fires or fire evacuations, 49 fire drills and 30 emergency drills. Resp. Exh. 116.

16. CWC's Disaster Plan (Resp. Exh. 118) requires evacuation drills once per shift per fiscal year, and removal of residents from immediate danger. Use of tunnels and elevators are prohibited during disaster responses. The plan provides that "All staff are expected to assist with resident movement." In response to a tornado warning, all ambulatory residents are to be moved to basement corridors and non-ambulatory residents are to be moved to central corridors.

17. When an emergency is called, any R.N. who is a charge nurse must go to the point of the emergency. (Steele testimony)

18. All staff at CWC, including charge nurses and supervisors, must be able to provide direct care to residents. (Gruchow testimony)

19. The night shift charge nurse also serves as the nurse clinician for buildings 5, 6 and 7, which had approximately 130 residents at the time in question. The night charge nurse serves as the medical expert for the entire facility during the shift and in that role has to assess, participate with and provide guidance to the other (subordinate) staff. The same is true for the charge nurse on the p.m. shift except for the first 2 hours of the p.m. shift. (Gruchow testimony)

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[5] Resp. Exh. 115 is a tabulation of pedometer readings that indicates a typical distance for all three shifts is approximately 3 miles.

20. Someone limited to 10 minutes standing or walking per hour is unable to perform the duties of the charge nurse at CWC. (Joseph and Gruchow testimony)

21. Complainant suffered an injury to her right knee while at CWC on June 14, 1998.

22. Respondent's policy during the relevant time period was to provide alternative work assignments to employees who had suffered work-related injuries and could not perform the regular assignments until such time as they reached an "end-of-healing" and the work restrictions became permanent. This policy was designed to allow an employee who is injured on the job an opportunity to heal and return to their duties.

23. Complainant was off work after her injury until June 24, 1998, when she was assigned temporary, sedentary duties. (Comp. Exh. 4) She was assigned to assist with TB skin tests and to complete certain documentation in Building 4. However, complainant was frequently unable to complete these assignments for a full shift due to pain and swelling. She worked half-time for much of this period.

24. Complainant informed respondent that she would need to have surgery and Ms. Steele then discussed issues with the complainant about her return to work and possible accommodations.

25. Complainant underwent surgery on or about August 14, 1998.

26. When complainant returned to work on October 19, 1998, she was given another alternative work assignment (Resp. Exh. 106). This assignment was in the infection control department where complainant updated employee files regarding tuberculosis tests. Complainant also had other alternative assignments in the area of TB testing. Complainant initially worked part time but gradually increased her time at work until she was working full time.

27. In approximately October of 1998, Ms. Steele called complainant at home and advised her of a vacancy for an 80% position at CWC as a night shift charge nurse. Complainant said she was interested and respondent transferred the complainant

from her former 100% position into the 80% position effective October 25, 1998. (Comp. Exh. 5) However, complainant never worked in this new position.

28. On December 1, 1998, Dr. J.S. Keene, complainant's physician from the Orthopedic Clinic of UW Hospital and Clinics (Resp. Exh. 108, p. 1) faxed a document to respondent entitled "Physician Estimate of Physical Capabilities." This document stated that complainant's condition was "unchanged," that she could "return to work" and that she had permanent work restrictions and a permanent 15% partial disability. Although the form included numerous boxes that could be checked to identify specific limitations, including time limits on sitting, standing and walking and weight limits for lifting, carrying and pushing/pulling, none of the boxes were checked and the form merely listed the following information under the category of "Other restrictions/capabilities/comments:" "End of healing. . . . Pain meds as needed . . . . Light duty category - permanent." Both Dr. Keene and complainant signed the document.

29. Respondent did not seek any follow-up information from Dr. Keene until January 6, 1999.

30. Respondent concedes that complainant has a qualifying disability under the Fair Employment Act.

31. After December 1st, complainant's disability was considered permanent and it prevented her from standing more than 5 to 10 minutes per hour and from walking more than 5 to 10 minutes per hour.

32. Ms. Steele understood that complainant had a permanent 20 lb. lifting restriction as well as the restrictions on walking and standing and Ms. Steele understood that if respondent had asked complainant to do any significant lifting (as was required for her job as charge nurse or in any resident care position) this would have been contrary to her lifting restrictions. Ms. Steele's understanding was premised on information she had received from a member of respondent's staff who deals with workers compensation matters.

33. On December 7, 1998, complainant asked to be considered for the Nursing Supervisor 2 position vacancy for day shift unit director in Murphy Hall. (Comp. Exh. 9) Complainant was not selected for the position.

34. Respondent convened a meeting with complainant on Friday, December 11, 1998. Present were Robin Gruchow, a personnel assistant within CWC's Personnel Office, and Sharon Lambrecht, CWC's workers' compensation coordinator, as well as complainant.

35. The purpose of the meeting (Gruchow testimony) was to inform complainant that 1) her alternative work assignment had ended; 2) her Charge Nurse position was inconsistent with what were now permanent work restrictions; and 3) respondent needed to provide her retraining, if necessary, in order for her to function in alternative positions that fell within her restrictions.

36. By memo dated December 11, 1998, Robin Gruchow issued a notice (Comp. Exh. 10) "to whom it may concern" that read:

> Effective immediately, Angela Ellis is placed on an indefinite leave without pay from her Nursing Supervisor position at Central Wisconsin Center. This is due to information we have received stating she has permanent physical restrictions that prevent her from doing the essential duties of her position.

Mr. Gruchow concluded that because complainant was collecting worker's compensation during this period, she was not going to be economically penalized by the leave without pay.

37. Upon receiving this letter on or about December 11th, complainant considered her employment to be terminated. Complainant understood she had no responsibility to follow any directives issued by the respondent or to inform respondent of her whereabouts.

38. On December 17th, Ms. Steele issued an "intent to terminate" letter (Comp. Exh. 11) that advised the complainant of a meeting on December 22nd.

> This letter is to inform you of our intent to terminate your employment as a Nursing Supervisor 2 - 80%, due to y our failure to meet the probationary standards based on medical documentation.

> This action is being taken pursuant to Section ER-Pers. 13.08, Wis. Adm. Code and Section 230.28 of the Wisconsin Statutes which provides that you be informed of the reason for our recommendation to terminate your employment during your probationary period.
>
> You are being afforded the opportunity to respond to the reason for termination at a meeting with me at 9:00 a.m., Tuesday, December 22, 1998 in my office of the Administration Building. If you fail to appear at this meeting, we will assume you do not wish [to] have this meeting and your employment will be terminated effective January 22, 1999.

Respondent mailed this letter to the complainant's home address in Madison.

39. In addition to the matters described in the December 17th letter, respondent also intended that during the December 22nd meeting it would go over complainant's 3-month evaluation, review the concerns regarding the end-of-healing notification, explain that respondent could not continue to have complainant function in a charge nurse position and discuss other options for employment including at CWC. (Steele testimony) Respondent prepared a transfer list (Resp. Exh. 110) to serve as the basis for a discussion with complainant, at the meeting, about the possibility of working in another job in state service and getting into the transfer/accommodation referral system. The cover document to the list is entitled "Transfer as an Accommodation Referral Information." While respondent had already concluded it could not employ complainant in her current position at CWC, respondent was going to give complainant a chance to fill out a disability accommodation request form (RE 110).[6]

40. Complainant left Madison for Cleveland, Ohio, on or about December 18, 1998. Complainant did not notify respondent of her departure. Sometime prior to December 22, 1998, complainant received Ms. Steele's December 17th letter.

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[6] Ms Catencamp testified as follows:

> The next form [in Resp. Exh. 110] is the disability accommodation request form. And this is the form that I was going to ask Angela to, um, fill out if she felt like there were any reasonable accommodations that we could give to her so that she would be able to do the job that she had. Um, I don't know that that would have been a possibility but, you know, it would have been up to Angela to talk about it if there was something that she might have been able to work with us on. [Examiner's transcription of tape recording of Ms. Catencamp's testimony.]

41. By letter (Comp. Exh. 12) dated December 21st to Ms. Steele, complainant wrote, in part:

> In response to your letter dated December 17, 1998 stating your intent to terminate my employment at Central Wisconsin Center and requesting a meeting in your office on December 22, 1998 at 9:00 a.m. I decline the opportunity. However, I disagree with the termination in light of the fact that my termination is the direct result of a work rule violation on the part of another employee which resulted in injury and permanent disability for me, not intentional failure to meet the requirements of my probation. . . .
>
> In lieu of that meeting I am requesting a written response to the following:
>
> > Why was there no reasonable effort to accommodate or reassign me to work that would be within the "permanent light duty" restriction at the Center or within the Department of Health and Family Services?
> >
> > Why was my position reduced from 100% to 80% . . . .

Complainant used her regular home address in Madison as the return address for this letter. Complainant still did not notify respondent that she was in Cleveland rather than Madison.[7]

42. Complainant sought a written response to the questions in her December 21st letter and she expected the response to be mailed to her Madison address.

43. Respondent did not send complainant a written response to her December 21st letter and chose, instead, to respond to complainant's questions during scheduled meeting(s) with the complainant. (Steele testimony)

44. Complainant did not attend the December 22nd meeting. Later on that day, when complainant did not show up for the meeting, Ms. Steele tried to telephone

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[7] Complainant takes that position that she did not notify respondent how to reach her because she believed she had already been terminated from her position. Complainant also takes the position that she both mailed and faxed her letter dated December 21st in order to insure receipt by respondent, although complainant testified she was unsure whether it was faxed from Cleveland or Madison.

her at home but there was no answer, so Ms. Steele left a message asking complainant to call back. Complainant never returned the call.[A]

45. On December 28th, respondent issued another letter (Comp. Exh. 13, Resp. Exh. 109) to complainant setting a second meeting date for January 4, 1999, at 10:30 a.m.:

> This letter establishes a second effort on our part to schedule a meeting with you to discuss your current and future employment status. We would also be happy to discuss all the questions you raise in your letter at this meeting. Please report to Room 32, which is across from the Personnel Office, to meet with Kathi Steele and Personnel staff on Monday, January 4, 1999 at 10:30 AM.
>
> You must be aware however, that your failure to attend this January 4 meeting will result in termination effective January 22, 1999.

46. Complainant did not appear at the January 4, 1999, meeting.[8]

47. When complainant did not attend the January 4th meeting, respondent decided to terminate her employment because of Dr. Keene's written notification that complainant required permanent light duty which formed the basis for respondent's conclusion that she was not physically able to perform her duties as charge nurse and because complainant had failed to attend the meetings. (Steele testimony)

48. Amy Salzberg, a workers' compensation claims examiner for the Department of Administration, faxed four questions to complainant's physician, Dr. Keene, on January 6, 1999, asking him how many hours per day the complainant could sit, stand, walk and drive.

49. By letter (Comp. Exh. 14) dated January 7, 1998, complainant wrote to respondent that she did not get the December 28th letter until January 6th , and the commission so finds,[B]and stated that she would be unavailable from January 8th until February 1st:

[A] The Commission has clarified this finding to more completely reflect the record.

[8] Complainant takes the position that she did not receive the December 28th letter until after January 4th. (Ellis testimony)

[B] This finding is consistent with complainant's testimony, is undisputed, and there is no reason not to so find.

> I received your letter on January 6, 1999 which was after the requested meeting time on January 4, 1999 at 10:30.
>
> This is the second effort on my part to secure written response to the issues raised in my December 21, 1998 letter written to Kathi Steele. I am again requesting written responses so as to be certain that all responses are clear and concise.
>
> I will be unavailable from January 8th through February 1, 1999.
>
> If you wish to contact me after February 1, 1999, please do so. Should a mutually agreed time for a meeting be established after February 1, 1999 and you have not responded in writing as requested in my December 21, 1998 letter then the meeting will be taped for future reference.

Complainant again used her regular home address as her return address on the letter.

50. By letter (Resp. Exh. 111) dated January 11th, respondent wrote to notify complainant that her employment was being terminated effective January 22, 1999. The letter included the following language:

> This decision is due to your failure to meet the probationary standards as a result of your inability to perform the required duties of the job.

Respondent enclosed a copy (Resp. Exh. 112) of complainant's final PPD, dated January 11th that noted complainant was "not able to perform essential duties."

51. Dr. Keene responded (Comp. Exh. 8, p. 2) to Ms. Salzberg's questions on January 12th with the following information:

> In an eight hour day, please indicate how many hours per day Ms. Ellis can:
> Sit 8
> Stand 5-10 min/hr
> Walk Intermittent (5-10min/hr)
> Drive Unknown

52. Complainant signed her complaint of discrimination (Comp. Exh. 1) on January 25, 1999, and filed it on April 2, 1999.

CONCLUSIONS OF LAW

1. This matter is properly before the Personnel Commission pursuant to §230.45(1)(b), Stats.

2. Complainant satisfied her burden of proof to establish that she is disabled and that respondent took adverse actions against her because of her disability.[C]

3. Respondent sustained its burden of proof to establish that there was a reasonable relationship between complainant's disability and her ability to undertake the job-related responsibilities of her employment.

4. Respondent failed to satisfy its burden of proof to establish that it reasonably accommodated complainant's disability, or that a reasonable accommodation would have imposed an undue hardship.[D]

5. Respondent violated the WFEA's accommodation requirement when it failed to engage complainant in an interactive process to determine if complainant's disability could be accommodated before it placed her on leave without pay.[E]

6. Respondent's violation of the WFEA accommodation requirement continued after it placed complainant on leave without pay, and said violation was not interrupted when respondent provided the complainant with the opportunities to attend either the December 22, 1998, meeting, or the January 4, 1999, meeting.

7. Respondent's duty of accommodation ceased on January 8, 1999, in connection with the complainant's letter of January 7, 1999, (Comp. Exhibit 14), unilaterally declaring herself unavailable for any meeting on or before February 1, 1999, and by so doing, refusing to engage in an interactive process to determine a reasonable accommodation.

8. Respondent did not violate the WFEA in connection with its termination of complainant's employment effective January 22, 1999.

[C] This conclusion is changed to reflect the allocation of the burden of proof on these issues.
[D] This conclusion is changed to reflect the allocation of the burden of proof on these issues.
[E] This and the following changes in the conclusions are made to reflect the Commission's change in the substantive decision of this case from the examiner's proposed interim decision and order. The rationale for these changes is explained in changes in the opinion.

The Commission's analysis in a claim of disability discrimination under the Fair Employment Act is described in *Target Stores v. LIRC*, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998):

> The complainant in a disability discrimination case must show that: (1) he or she is disabled within the meaning of the WFEA and that (2) the employer took one of the enumerated actions on the basis of disability. The employer then has the burden of proving a defense under §111.34, Stats. Under §111.34(2)(a) it is not a violation of the WFEA to take an employment action based on an individual's disability "if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment. . . ." However, if an employer refuses to reasonably accommodate an employee's (or prospective employee's) disability and is unable to demonstrate that the accommodation would pose a hardship, then the employer violates the WFEA. Section 111.34(1)(b). Reading the two paragraphs of §111.34 together, once the employee has met the first two showings, the employer must show either that a reasonable accommodation would impose a hardship - §111.34(1)(b), or that, even with a reasonable accommodation, the employee cannot "adequately undertake the job-related responsibilities" - §111.34(2)(a). 217 Wis. 2d 1, 9-10 (citations and footnotes omitted and term "handicap" changed to "disability" to reflect statutory change)

The focus of this case is on respondent's decision on December 11, 1998, to place the complainant on leave without pay and on the respondent's subsequent decision, as reflected in the January 11, 1999, letter, to terminate complainant's employment. Although the issues for hearing as set forth at the beginning of this decision initially appear to suggest a somewhat wider scope to the issues, the complainant has not argued that the alternative work assignments she received both before and after her surgery were inappropriate, that respondent engaged in race discrimination, or that she was harassed by respondent.

Respondent concedes that complainant has a qualifying disability under the Fair Employment Act. (Resp. post-hearing brief) However, there is some disagreement as to the nature of the complainant's limitations. Complainant states (brief p. 6) that her disability was only in terms of her ability to stand and walk, and that she was never limited in her ability to lift. (Complainant's testimony) However, complainant con-

tends that respondent *perceived* her as having a lifting disability and contends that this perception was based on the hearsay information in the CorVel Corporation memorandum (Resp. Exh. 129).

Ms. Steele testified she understood complainant had a 20 lb. lifting restriction and respondent suggested that this understanding would have come from complainant's Worker's Compensation (WC) materials. There is nothing in the WC log (RE 105) specifically mentioning such a restriction. However, the parties stipulated that complainant's Worker's Compensation file maintained by CWC included a facsimile from Nancie Nie, R.N., of the CorVel Corporation (Resp. Exh. 129) dated December 1, 1998, to Amy Salzburg (an employee of the Department of Administration who has workers' compensation responsibilities) and Sherry Lambrecht, specifying that complainant had a 15% permanent partial disability and a 20 pound lifting restriction. Complainant testified that she knew CorVel was a contract agency that performed Worker's Compensation evaluations for the State of Wisconsin.

Complainant raised a hearsay objection to consideration of the truth of the information found in the CorVel document and the parties' stipulation for the admission of that exhibit (Resp. Exh. 129) did not include a withdrawal of the hearsay concern. The document was properly admitted for the purpose of establishing the basis for Ms. Steele's understanding that complainant had a lifting restriction, yet the Commission declines to consider the document as evidence that complainant actually had a 20-pound lifting restriction. While the Commission is not bound by the hearsay rules,[9] complainant did not have an opportunity to question Ms. Nie or anyone else from the CorVel Corporation as to the basis for the notation that complainant had a 20-pound lifting restriction. Had the complainant's hearsay objection been overruled, the complainant would have been harmed by her inability to have cross-examined anyone as to the source or reliability of the notation. The Commission also notes that respondent, as an

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[9] Pursuant to §PC 5.03(5), Wis. Adm. Code:

> Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.

agency of the State of Wisconsin, had contracted with CorVel to perform the Worker's Compensation evaluations. This relationship means that CorVel was less independent a source than might exist for other examples of medical records/information.[F]

It is undisputed that respondent based its December 11th decision to place complainant on leave without pay and its January 11th decision to terminate her employment on its conclusion that the complainant was disabled.

The burden now shifts to respondent to prove a defense under §111.34, Stats. It would not be a violation of the Fair Employment Act for respondent to take employment actions based on complainant's disability "if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment." §111.34(2)(a), Stats.

The Commission is satisfied that the respondent has met the burden of establishing that the complainant's inability to spend more than 5 to 10 minutes walking per hour and more than 5 to 10 minutes standing per hour was "substantially related" to complainant's ability to perform the duties of a charge nurse at CWC. Respondent established that charge nurses walk approximately 3 miles per day and spend approximately 5 hours per shift on their feet. Charge nurses must be able to respond to emergency situations in order for respondent to adequately provide for the safety of CWC residents and staff. CWC is a very large facility, with hundreds of residents and up to ½ mile between buildings. Complainant's permanent disability prevented her from performing those duties specified in her position description (Finding 12). She was unable to complete rounds in order to check on the residents, she was unable to supervise far-flung staff and she was unable to take direct action to meet emergencies. She could not work for more than 5 to 10 minutes from a standing position, could not stand or walk for several hours per day, could not travel freely throughout the buildings and grounds and could not make the necessary observations.

[F] The Commission has added the last two sentences to this paragraph to more completely set forth the reasons for sustaining complainant's hearsay objection.

Reasonable accommodation

Even though the Commission is satisfied that the complainant's permanent disabilities meant she was unable to adequately perform the responsibilities of her position, there is still the question of whether her disability could have been accommodated. Complainant contends that respondent failed to provide her with reasonable accommodation. An employer has a statutory responsibility to accommodate an employee's disability in accordance with §111.34(1)(b), Stats., which incorporates both the concept of reasonable accommodation and undue hardship, *see McMullen v. LIRC*, 148 Wis. 2d 270, 277, 434 N.W.2d 830 (Ct. App. 1988):

> We do note that while there may be some overlap regarding the factors to be considered in determining whether an accommodation is reasonable and whether it would impose a hardship on a particular employer, the two are separate and distinct considerations that are to be addressed independently.[G]

The burden of proof on the issue of reasonable accommodation (and hardship) rests with the employer. *Giese v. DNR*, 83-0100-PC-ER, 1/30/85.

Ten days after respondent learned from Dr. Keene on December 1st that complainant had reached an "end of healing," Robin Gruchow, a personnel assistant, and Sharon Lambrecht, CWC's workers' compensation coordinator, met with complainant, ended the light duty assignment complainant had performed as an accommodation during her recovery and placed complainant on an indefinite leave without pay. At the time of the December 11th meeting, the respondent knew that complainant had permanent work restrictions and was only capable of performing work in "Light duty category – permanent." Dr. Keene later clarified that complainant was unable to stand more than 5 to 10 minutes per hour or walk more than 5 to 10 minutes per hour. The permanent light work restriction was inconsistent with CWC's policy of assigning light work only during the healing period.

Respondent failed to engage complainant in an "interactive process" before unilaterally placing her on leave without pay (LWOP). Respondent advised complainant

[G] The Commission has added some prefatory language from the court's decision in order to make the quotation more readily understood.

of its decision on December 11th, but did so without providing complainant an opportunity to discuss possible transfer options.

The commission concludes that the respondent's duty of accommodation in this case included the obligation to participate in a flexible, interactive process with the complainant toward the goal of identifying an appropriate accommodation.[H] Under federal accommodation law, this process is usually discussed in connection with the rules promulgated in the CFR, but some federal courts have concluded that the obligation to engage in such a process is inherent in the statutory duty of accommodation, and the commission believes that the same principle applies under the WFEA.

29 CFR s. 1630.2(o)(3) provides:

> To determine the appropriate reasonable accommodation it *may be necessary* for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (emphasis added)

See, e. g., Barnett v. US Air, 228 F. 3d 1105, 1112 (9th Cir. 2000) *(en banc);* reversed other grounds, *US Air v. Barnett,* 535 U. S. 391, 401-402 (2002).[10] The court of appeals held:

> The phrase "may be necessary" is merely a recognition that in some circumstances the employer and employee can easily identify an appro-

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[H] The Commission has replaced two paragraphs, including one footnote, from the proposed interim decision in this matter with this paragraph and the following eleven paragraphs, including footnotes. The proposed interim decision had indicated that the "legal basis for requiring the employer to engage in an interactive process is more fully explicated in a proposed decision and order issued in *Gamroth v. DOC*, 99-0196, 0209-PC-ER." The proposed decision in *Gamroth* remains pending before the Commission as of the date the instant ruling is being issued. Under these circumstances, the Commission felt it would be preferable to set forth, in full, the legal analysis engaged in by the Commission in reaching its conclusion that an interactive process is required.

[10] *See* Justice Stevens' concurring opinion:

> The Court of Appeals also correctly held that there was a triable issue of fact precluding the entry of summary judgment with respect to whether petitioner violated the statute by failing to engage in an interactive process concerning respondent's three proposed accommodations. 228 F. 3d 1105, 1127 (9th Cir. 2000) *(en banc).* The latter holding is untouched by the Court's opinion today.

> priate reasonable accommodation. Any doubt that the EEOC views the interactive process as a mandatory obligation is resolved by the EEOC's interpretive guidance, which states that "the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." 29 CFR Pt. 1630, App. S. 1630.9. The EEOC's Enforcement Guidance also specifies the nature of the interactive process: "The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate accommodation." *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* EEOC Compliance Manual (CCH), s. 902, No. 915.002 (March 1, 1999) at 5440.

See also Zuikovic v. S. Cal. Edison, 302 F. 3d 1080, 1089 (9th Cir. 2002) (Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown); *Jacques v. DeMarzio*, 200 F. Supp. 2d 151, 168 (E. D. NY, 2002) ("Vast majority" of courts that have addressed the issue have held that employers have a mandatory obligation to engage in an interactive process; although this obligation is not explicitly statutorily provided for, it is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise disabled employee); *Smith v. Midland Brake Inc.,* 180 F. 3d 1154, 1172 (10th Cir. 1999) ("The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee; the interactive process is typically an essential component of the process by which a reasonable accommodation can be determined.")

An employer's failure or refusal to engage in an interactive process regarding an accommodation can leave the employee in the position of being responsible for orchestrating a process for which he or she frequently will be ill-equipped to handle, with respect to both resources and knowledge base.[11] *See Taylor v. Phoenixville School District,* 184 F. 3d 296, 316 (3d Cir. 1999) (ADA):

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[11] Obviously, the breakdown in the interactive process could also be attributable to the employee, depending on the circumstances of a particular case.

> The school district emphasizes that the only accommodation Taylor specifically requested was transfer to another position, which Taylor later conceded was not feasible. We do not think that it is fatal to Taylor's claim that her son[12] did not request a specific accommodation or that Taylor's request in March of 1994 was for an accommodation that she admitted was not possible. The interactive process, as its name implies, requires the employer to take some initiative. In *Bultemeyer*, the court explained, "If the note [from the psychiatrist requesting accommodation] was too ambiguous and [the employer] did not know what Bultemeyer wanted, [the employer] easily could have called [the psychiatrist] for a clarification." *Bultemeyer*, 100 F. 3d at 1285. The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement, and it unfairly exploits the employee's comparative lack of information about what accommodations the employer might allow.

In the commission's opinion, it is inherent in the statutory duty of accommodation that the parties must participate in a flexible, interactive process where this is needed to identify an appropriate accommodation. Such a requirement would not come into play in cases where, due to the particular circumstances involved, a conclusion about accommodation can be reached without such a process.[13]

In *Target Stores v. LIRC,* 217 Wis. 2d 1, 20, 576 N. W. 2d 545 (Ct. App. 1998), essentially this concept was involved where the employer never asked the employee's physician for more information about the length of time that would be needed for her treatment. The court rejected the employer's argument that "only in hindsight can anyone say the forbearance would have been temporary." *Id.* The court pointed

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[12] The employee's son had acted as a spokesperson for his disabled mother in requesting an accommodation.

[13] For example, if an employee returns to work after an injury with a letter from his or her doctor advising that because of limitations connected to the injury, he or she needs reassignment to a position that does not require lifting more than 30 pounds, there may be no need for an interactive process. *See Taylor v. Phoenixville School Dist.*, 184 F. 3d 296, 318, n. 9 (3d Cir. 1999) ("The regulation uses the phrase "may be necessary," in other words, because sometimes the necessary accommodation is obvious. We have also recognized that the [interactive] process is not necessary in cases where accommodation is impossible.")

out that "Target fired Crivello without asking for information on how long the inhaler treatment would be tried before trying the nasal CPAP machine and how long that machine might take to produce results. Had Target asked, the information provided would have been that, in all likelihood, the accommodation would have been necessary only on a short-term basis." *Id.* This implies that the employer did have some kind of obligation to engage in interactive discussions regarding an accommodation.

Such an implication also finds support in the following discussion in *Target Stores:*

> LIRC concluded that Target's suggestions at the Phase II meeting--that Crivello might want to consider a different schedule, transfer to a different department, or take a leave of absence--did not fulfill Target's obligations because at the time Crivello had not been diagnosed as having sleep apnea. Target was unaware that she had a handicap that required accommodation and Target did not have a reason to believe that any of these suggestions would resolve the sleeping problem. In addition, Target did not reiterate its offer of a leave of absence after it learned of her medical condition.
>
> We do not understand LIRC to be holding, as Target claims, that an employer never has a duty to accommodate under s. 111.34(1)(b), Stats., until there is a precise medical diagnosis of the handicap. Rather, LIRC's conclusion is that, given the information that Target (and Crivello) acquired after the Phase II meeting, Target's decision to fire Crivello a couple of weeks later for sleeping at work, without either renewing the offer for a leave of absence or waiting to see if the treatment worked, constituted a refusal to reasonably accommodate in spite of the earlier suggestions.
>
> Target is, in effect, arguing that s. 111.34(1)(a), Stats., should be interpreted such that once the suggestions were made and not accepted, regardless of how little was known then by either party and how much was later learned, Target had met its obligation. While this may be a reasonable interpretation of the statute, LIRC's interpretation is also reasonable. *LIRC's interpretation considers the employer's obligation not as a static one, but as one very much affected by the information it has, which may change.* This is not contrary to the words of the statute. It is reasonable. And, as we mentioned, LIRC's finding concerning the information Target had is supported by the record. 217 Wis. 2d at 14-15. (emphasis added)

In the Commission's opinion, the rationale for requiring that the parties engage in a flexible, interactive process to explore the question of accommodation also relates to the reason why the employer should bear the burden of proof on the issue of whether a reasonable accommodation is available. Where the employer does not engage in the interactive process, it would be unfair to require the employee to have to show there was a reasonable accommodation possible. As the court said in *Taylor v. Phoenixville School District, id.*:

> The ADA's regulations make clear that the purpose of the interactive process is to determine the appropriate accommodations: "This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that would overcome those limitations." 29 CFR s. 1630.2 (o)(3). Therefore, it would make little sense to insist that the employee must have arrived at the end product of the interactive process before the employer must have a duty to participate in that process.

Another factor that supports the conclusion that an interactive process is required by the accommodation provision in the WFEA, is that the respondent in this case is, of course, a state agency, and the legislature has committed the state as employer to significant efforts for affirmative action. *See* s. 230.01, Wis. Stats.:

> (2) . . . It is the policy of this state to provide for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment shall be based on the ability to perform the duties and responsibilities assigned to the particular position without regard to . . . disability. It is the policy of this state to take affirmative action which is not in conflict with other provisions of this chapter.

S. 230.04(9):

> The secretary [of the department of employment relations] shall do all of the following:
>
> (a) Establish standards for affirmative action plans to be prepared by all agencies . . . .
> (b) Review and approve or disapprove any affirmative action plan prepared by an agency to ensure compliance with the standards established under para. (a) . . . .

(c) Monitor, evaluate and make recommendations to each agency to improve its progress toward providing equal opportunity to employees . . .

.

S. 230.06:

(1) An appointing authority shall:

* * *

(g) Prepare an affirmative action plan which complies with the standards established by the secretary under s. 230.04(9)(a) and which sets goals and outlines steps for incorporating affirmative action into the procedures and policies of his or her agency.

S. ER 43.01, Wis. Adm. Code:

Policy. It is the policy of this state to ensure equal opportunity without regard to . . . handicap. . . . In furtherance of this policy, all persons responsible for employment decisions shall, within the scope of their assigned responsibilities:

(1) Exercise administrative authority and personnel leadership to prohibit, prevent and eradicate every form of discrimination from the agency's policies, practices, and working conditions.
(2) Take affirmative action as defined in s. 230.03(2), Stats.[14] . . . .
(3) Integrate equal opportunity and affirmative action concerns into the agency personnel management system under their control.
(4) Develop and implement innovative personnel management procedures to aid in the achievement of affirmative action goals.

Also, s. 230.02, Stats., provides: "Statutes applicable to the department shall be construed liberally in aid of the purposes declared in s. 230.01[15]", and s. 111.31(3), Stats., provides as follows:

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[14] Section 230.03(2) provides: "'Affirmative action' means specific actions in employment which are designed to and taken for the purposes of all of the following:

(a) Ensuring equal opportunities.
(b) Eliminating a substantial disparity between the proportion of members of . . . disabled groups . . . and the members of . . . disabled groups in the relevant labor pool.
(c) Eliminating present effects of past discrimination.

[15] "(2) . . . It is the policy of this state to provide for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment shall be based on the ability to perform the duties and responsibilities assigned to the particular position without regard to . . . disability. It is the policy of this state to take affirmative action which is not in conflict with other provisions of this chapter."

> In the interpretation and application of this subchapter [WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats.)], and otherwise, it is declared to be the public policy of this state to encourage and to foster to the fullest extent practicable the employment of all properly qualified individuals regardless of . . . disability. *Nothing in this subsection requires* an affirmative action program to correct an imbalance in the workforce.[16] This subchapter shall be liberally construed for the accomplishment of this purpose. (emphasis added)

The civil service code's stress on the importance of affirmative action, combined with the liberal interpretation requirements for both the civil service code and the WFEA, are consistent with an approach to accommodation issues that imposes a requirement that the state be pro-active in engaging in a cooperative, interactive process to attempt to identify an appropriate accommodation, except in cases where such a process would be superfluous.

In the Commission's opinion, in discharging its obligation to engage in an interactive process, the employer must act in good faith and reasonably. These criteria are at least implied by the statutory proscription against "Refusing to *reasonably* accommodate an employee's or prospective employee's disability." (emphasis added) This principle is illustrated by case law developed under analogous federal law. For example, in *Smith v. Midland Brake, Inc.*, 180 F. 3d 1154 (10th Cir. 1999) (*en banc*), the court applied the ADA, which defines discrimination to include:

> [N]ot making *reasonable* accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. 42 USC 12112(b)(5)(A) (emphasis added)

The court held as follows:

> Once it is appropriate to consider reassignment, the employer is required only to take reasonable steps to accomplish a reassignment. The duty of reassignment is not an absolute one, but rather is in all particulars suffused with the limitation that the employer need only take such actions

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[16] Notwithstanding this caveat applicable to all employers, the state as employer is subject to the specific affirmative action obligations in the civil service code, as discussed above.

> for reassignment as are reasonable under the circumstances. We derive the important limiting factor of reasonableness on an employer's duty to reassign from the statute itself, which requires only reasonable accommodation. Everything that an employer must do in terms of a reassignment is modified by the adjective reasonable, just as that adjectives modifies any other accommodation required by an employer under the ADA.
>
> * * *
>
> Once the employer's responsibilities within the interactive process are triggered by appropriate notice by the employee, both parties have an obligation to proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations, for another job within the company and, if so, to identify an appropriate reassignment opportunity if any is reasonably available. The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified employee. The interactive process is typically an essential component of the process by which a reasonable accommodation can be determined. 180 F. 3d at 1171-72 (citation omitted)

The court noted that the interactive process is a concomitant of the statutory requirement of reasonable accommodation, and although sometimes a reasonable accommodation can be determined without an interactive process, it is frequently essential. 180 F. 3d at 1172, n. 10 The court further held that the obligation to participate in the interactive process runs to both employer and employee:

> [t]he interactive process includes good-faith communications between the employer and employee . . . . The exact shape of this interactive dialogue will necessarily vary from situation to situation and no rules of universal application can be articulated. . . .There are no doubt cases in which the employee's failure to provide a medical release is unreasonable, breaks down the interactive process, and thereby insulates the employer from ADA liability. *Id.* at 1172-73.

Beck v. UW, 75 F. 3d 1130 (7th Cir. 1996), is another case holding that both parties have the duty to engage in an interactive process that should be marked by "the concepts of good faith and reasonable effort," 75 F. 3d at 1136:

> Neither the ADA nor the regulations assign responsibility for when the interactive process fails.

> No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility. *Id.* at 1135.

Here, the respondent did not engage in an interactive process before it placed complainant on LWOP. The respondent lacked the information necessary to determine whether there were any positions within CWC or elsewhere at DHFS to which the complainant might have transferred. Pursuant to *McMullen v. LIRC*, 148 Wis. 2d 270, 276, 434 N.W.2d 830 (Ct. App. 1988), reasonable accommodation may require an employer to transfer an individual from one job to another. Respondent failed to consider whether a transfer to another position was an option for the complainant. It wasn't until after respondent placed complainant on a leave without pay that it began to explore the transfer option.[I]

In order to determine the extent of the respondent's liability, it is necessary to scrutinize the process the parties followed subsequent to respondent's action of imposing LWOP.[J] As implied in the proposed decision, respondent did not satisfy its accommodation obligation by scheduling a meeting on December 22, 1998, through its

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[I] While the respondent did not satisfy its accommodation obligation in general terms when it failed to consider transfer options for the complainant, complainant's work restrictions meant that she was unable to perform the specific positions of charge nurse and she was unable to satisfy the requirements for the unit director position in Murphy Hall, referenced in Finding 33. Testimony established that Murphy Hall contained 4 separate living units and as such was much bigger than the other residence halls at CWC. The Murphy Hall unit director position required the incumbent to provide direct care to the residents as well as hands-on management for the unit staff. The incumbent had to make rounds that took approximately 2 hours daily as well as respond to emergencies. (Krzizke testimony) These duties were inconsistent with the complainant's restrictions. (Gruchow, White testimony)

[J] The remaining paragraphs in the this section of the interim decision have been added or revised to reflect the Commission's change in the substantive decision of this case from the examiner's proposed interim decision and order.

December 17, 1998, "intent to terminate" letter. While respondent intended to discuss the question of accommodation at this meeting, it did not indicate that in this letter, which stated as follows:

> This letter is to inform you of our intent to terminate your employment as a Nursing Supervisor 2 – 80%, due to y our failure to meet the probationary standards based on medical documentation.
>
> This action is being taken pursuant to Section ER-Pers. 13.08, Wis. Adm. Code and Section 230.28 of the Wisconsin Statutes which provides that you be informed of the reason for our recommendation to terminate your employment during your probationary period.
>
> You are being afforded the opportunity to respond to the reason for termination at a meeting with me at 9:00 a.m., Tuesday, December 22, 1998 in my office of the Administration Building. If you fail to appear at this meeting, we will assume you do not wish [to] have this meeting and your employment will be terminated effective January 22, 1999. (Compl. Exhibit 11)

Complainant had no reason to think that this meeting would address accommodation issues. She did not attend, while positing a specific question regarding accommodation in her December 21, 1998, letter which she requested be answered in writing in lieu of a meeting: "Why was there no reasonable effort to accommodate or reassign me to work that would be within the 'permanent light duty' restriction at the Center or within the Department of Health and Family Services?" (Comp. Exhibit 12) Since respondent gave no indication that it would or was willing to discuss accommodation at this meeting, this did not constitute an effort by respondent to engage in a cooperative, interactive effort to address the question of accommodation.

The next relevant event was respondent's December 28th letter (Comp. Exh. 13), wherein respondent wrote that the January 4th meeting would include a discussion of complainant's "current and future employment status" as well as covering "all the questions you raise in your letter," which included complainant's question about accommodation, set forth above.

Ms. Catencamp testified that she was going to attend the January 4th meeting in order to try to talk about other job opportunities within state service and getting com-

plainant into the transfers/accommodation referral system. The packet of materials that respondent had prepared for the meeting included a disability accommodation request form.

Respondent's December 28th letter[17] provided a reasonable person with notice that possible accommodation, including working in alternative positions within CWC and in DHFS, was a topic for the January 4th meeting with complainant. Respondent sent the December 28th letter to complainant at her home address. Complainant had not notified respondent that she was in Cleveland and complainant's December 21st letter did not suggest that she was anywhere other than at her regular home address. Complainant did not appear at the January 4th meeting and respondent terminated her employment. Respondent provided complainant notice and an opportunity to engage in an interactive process during the January 4th meeting, but the Commission disagrees with the examiner's proposed implied conclusion that the notice provided was reasonable as to time under the circumstances in this case. Assuming respondent's December 28, 1998, letter was mailed that date, and allowing one day for delivery, it would have been delivered to complainant's residence on Tuesday, December 29th. Based on this assumption, complainant would have had no more than one business day notice, prior to the start of a four-day holiday weekend, of the meeting that was to occur on the following Monday, January 4, 1999. Given the fact that people frequently travel or are otherwise occupied in connection with such holidays, and the record does not reflect any reason why more notice could not have been given--the letter told complainant that the effective date of her termination was scheduled for January 22, 1999--the commission concludes that the notice in this case did not provide enough lead time to be considered reasonable. Therefore, respondent's December 28th letter did not interrupt the respondent's period of liability for failing to provide a reasonable accommodation.

However, after complainant received this letter on January 6, 1999, her January 7th letter in response constituted a failure on her part to reasonably participate in the in-

[17] In contrast, the respondent's December 17th letter merely informed complainant of respondent's "intent to terminate" her employment and gave her an "opportunity to respond" at a meeting scheduled for December 22nd.

teractive process and thus "insulates the employer from . . . liability." *Smith v. Midland Brake Inc.,* 180 F. 3d at 1173. In her January 7th letter, complainant unilaterally and without explanation declared herself unavailable for a meeting until after February 1st. Respondent had already referenced January 22nd as the effective date of termination in both its December 17th and December 28th letters. Complainant's demand that no meeting be held before February 1st, would have had the effect of delaying the termination beyond the date established by respondent, and can not be considered a reasonable response to respondent's December 28th letter. Therefore, respondent's period of liability for its failure to accommodate runs from December 11, 1998, when complainant was placed on leave of absence without pay, to January 8, 1998, when respondent presumably received complainant's January 7th letter.

ORDER

The parties agreed at the hearing in this matter to reserve the topic of mitigation of damages. However, in light of the limited scope of the Commission's finding of discrimination, the Commission assumes there is no need for any additional testimony. The respondent is ordered to cease and desist from denying complainant an accommodation in any future employment she may have with DHFS. Respondent is ordered to award complainant any back pay to which she may be entitled for the period from December 11, 1998, until January 8, 1999, less any appropriate set-offs for other benefits received for that period, plus interest calculated pursuant to §PC 5.07, Wis. Adm. Code. The parties will be given the opportunity to address the question of appropriate attorney's fees. The parties are to consult and attempt to reach agreement on the specific amount of respondent's liability, and on the question of attorney's fees and costs. The parties are to advise the Commission (or, assuming the Commission has been eliminated by then pursuant to the budget bill, the ERD) of the status of this matter within 20 days of the date of entry of this order.[K]

Dated: July 15, 2003 STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

KMS/AJT:990066Cdec1.3

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. *See* 68 Op. Atty. Gen. 323 (1979).

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[K] The Order has been revised to reflect the Commission's change in the substantive decision of this case from the examiner's proposed interim decision and order.