STATE OF WISCONSIN PERSONNEL COMMISSION

EDNA BETLACH-ODEGAARD,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,

Respondent.

Case No. 86-0114-PC-ER

INTERIM DECISION AND ORDER*

This matter is before the Commission on consideration of a proposed interim decision and order dealing with the merits issued by the hearing examiner. Respondent has filed objections and both sides have argued the matter. At this time the Commission adopts the proposed interim decision and order, with certain minor changes, and adds the following comments to address certain of respondent's arguments.

The proposed decision states that complainant has the burden of proof except to the extent that "the employer has the burden not only of proving that the handicap is reasonably related to her ability to adequately perform the job, but also the burden of proving that it has satisfied its duty of accommodation." Vallez v. UW-Madison, 84-0055-PC-ER, 2/5/87, p. 9. In its objections to the proposed decision, respondent argues against this formulation:

> First, the Respondent is not in the best position to carry the burden with respect to the ability to perform. The law, specifically the burdens, in these cases should indicate and reflect what should happen at the time the alleged incident of discrimination occurs. That is, if the applicant

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* This decision is not final as the matter of remedy remains to be addressed.

> says that, due to a handicap, she cannot do the job (as she did in this case) the employer is not then at liberty to ascertain the validity of the assertion without violating existing restrictions on requiring physical examinations of handicapped applicants but not other applicants. Thus, the Complainant is not only the best party to carry the burden of showing that she is capable of performing the job, she is the party who should have the burden of overcoming her own earlier statement that she could not do the job.
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> Secondly, the Commission should consider subdividing the question of reasonable accommodation. This case raises an interesting issue as to which party has the burden of raising even the subject of accommodation, especially where the Complainant has asserted that she cannot do the job. Respondent's position is that, under such circumstances (especially involving an applicant, not a long-term employe), the Complainant must have at least some burden to suggest that accommodation options be considered by the prospective employer. Placing the burden on the Respondent to prove that reasonable accommodations were not available results in the Respondent having to try to imagine every possible suggestion the Complainant may ever make, even at a hearing years down the road, no matter how frivolous, and refute every one of those unknown possibilities, without the Complainant ever having suggested a thing in advance.

The Supreme Court has held that the burden of proof with respect to ability to perform rests on the employer:

> [O]nce Samens has demonstrated that he was rejected by WP&L because of his handicap, the burden of proof then shifts to the company to justify this rejection under the statute ... the focus narrows to whether Samens possessed the ability to perform the duties of a truck driver/groundman. (citations omitted) Samens v. LIRC, 117 Wis. 2d 646, 664, 345 N.W. 2d 432 (1984).

Given this explicit pronouncement, this commission is in no position to reconsider the allocation of the burden with respect to this element in this case.

The Commission addressed the question of proof on the issue of whether there is a reasonable accommodation available in Giese v. DNR, 83-0100-PC-ER (1/30/85), citing Prewitt v. USPS, 662 F. 2d 292, 27 FEP Cases 1043, 1054-55 (5th Cir. 1981), as follows:

> [T]he burden of proving inability to accommodate is upon the employer.[1] The administrative reasons for so placing the burden likewise justify a similar burden of proof in a private action based upon the Rehabilitation Act. The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources.
>
> Although the burden of persuasion in proving inability to accommodate always remains on the employer, we must add one caveat. Once the employer presents credible evidence that indicates accommodation of the plaintiff would not reasonably be possible, the plaintiff may not remain silent. Once the employer presents such evidence, the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence. (Citations omitted) 27 FEP Cases 1043, 1054-55.

The Commission sees no reason to vary from this allocation of the burden at this time. As Prewitt points out, typically the employer will be in a much better position than the applicant to carry this burden. There is a 1980 case, Fuller v. UW, 78-PC-ER-55, in which the Commission concluded that a complainant who had been on extended sick leave and had failed to submit requested medical reports after an early inconclusive one, but had stated in letters to his supervisors that he had been told by his doctor that he had permanent injuries and could not perform the duties of his employment, had "failed to carry his burden of showing that he was a qualified handicapped individual who could have performed his job if his employer provided him with a reasonable degree of accommodation." Id. at p. 10. However, any precedential value it may possess is weakened by the complete lack of any discussion of the allocation of the burden, and it was overruled sub silentio by

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[1] This is also the case under the Wisconsin FEA pursuant to §111.34(1)(b), Stats.

Giese, as well as being inconsistent in large part with the subsequent Supreme Court decision in Samens.

Respondent's asserted concerns about the particular evidentiary problems presented in this case do not dictate a change in the burden but are adequately addressed within the prevailing burden of proof framework. Respondent argues that complainant "should have the burden of overcoming her own earlier statement that she could not do the job." Assuming, arguendo, the factual premise[2] of this argument, such an admission would be probative of whether complainant could do the job. That is, it does not follow that because respondent has the burden of proof on the issue of the applicant's ability to perform that an applicant's admission of inability to perform would not be considered in weighing the evidence.

The Commission also disagrees with respondent's assertion that: "Complainant must have at least some burden to suggest that accommodation options be considered by the prospective employer." This argument does not really run to the concept of burden of proof, which has to do with how the case is heard, analyzed and decided, but rather runs to an element of complainant's case -- i.e., the complainant would have to be able to show, if refused employment, that he or she in fact at least broached the issue of accommodation at the time of the hiring transaction. The Commission is unaware of any precedent for such a requirement, and is unpersuaded that this is an appropriate element of a complainant's FEA handicap discrimination case.

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[2] The Commission agrees with proposed finding #14 that complainant at the job interview in fact said she was unable to read the menu, not that she was unable to do the job.

The FEA imposes a duty of accommodation on the employer, §111.34(1)(b), Stats. There are hiring situations where the employer does not have to come to grips with the issue of accommodation notwithstanding an applicant with a handicap related to the applicant's ability to perform. For example, an applicant may have a handicap which affects only his or her ability to drive a normal automobile, which would be used to drive to different job sites. If the employer decided after oral interview to hire another candidate who was better qualified to perform the basic job tasks, presumably there would be no need to raise the issue of accommodation with the handicapped applicant. However, if an employer reaches the conclusion that a handicapped job applicant who is otherwise in line to be hired faces a problem in performing the job because of that handicap, the employer then knows or should know that it has a duty of accommodation. The employer knows or should know that it is appropriate that "accommodation options be considered." If the prospective employe has some kind of obligation "to suggest that accommodation options be considered," this would appear to have the effect of rendering the Fair Employment Act nugatory as to persons who are not legally sophisticated enough to be aware of the FEA's accommodation requirement, or not sophisticated enough in terms of vocational rehabilitation to be aware that a particular accommodation would be available that would allow him or her to perform the job. For example, a job applicant who is unaware there is a duty of accommodation is unlikely to broach the subject of accommodation with the employer. The applicant having failed to discharge the obligation of broaching the subject, the employer would then be discharged of its statutory duty of accommodation, and the law would be rendered ineffective.

This does not mean that there could never be cases where an applicant would not have some obligation to come forward with information about a

possible accommodation, depending on the circumstances of the particular case. For example, in a situation where it appears that an applicant cannot adequately perform the duties of a position due to handicap, in most cases sound personnel management presumably would lead the employer to ask the applicant whether he or she was aware of any accommodation that would enable the applicant to perform. If the applicant were aware of an accommodation but failed to respond, it is certainly possible that in a subsequent FEA proceeding this could lead to an equitable estoppel against the applicant or be considered an admission against interest, etc.

Respondent also focuses on the use of the word "refuse" in §111.34(1)(b), Stats. ("Refusing to reasonably accommodate"):

> Under the FEA, an employer's refusal to reasonably accommodate an employe's handicap may be illegal discrimination. The definition of "refuse" is "to decline to do, accept, give, or allow". American Heritage Dictionary, 2nd College Ed. By definition, then, the act of refusing implies that a person is declining to do something that has already been requested. An employer cannot refuse an accommodation for which there has been no request. The legislature could have said "fail" instead of "refuse" and the implication of a request preceding the refusal would have been at least weaker. The word refuse must be assumed to have been selected for a purpose. (Brief, p. 10, emphasis in original) (Proposed decision, p. 13)

The Commission does not agree that the use of the word "refusing" in §111.34 (1)(b), Stats., means that an employer can decline to reasonably accommodate an applicant because the applicant has not requested an accommodation. Using the definition of "refuse" cited by respondent, "decline to do," it would seem that someone can decline to do something that either is requested by someone else or is required by law. This is illustrated by the definition of "refusal" found in BLACK's LAW DICTIONARY 1152 (5th ed. 1979): "the declination of a request or demand, or the omission to comply with some requirement

of law." (emphasis added) The definition of "refuse" in the same dictionary discusses the distinction between "failure" and "refusal":

> To deny, decline, reject. "Fail" is distinguished from "refuse" in that "refuse" involves an act of the will, while "fail" any be an act of inevitable necessity. (citation omitted) id. at 1153.

It is more probable that the legislature did not use the word "fail" in §111.34(1)(b), Stats., because the duty of accommodation is not absolute and an employer is not required to provide an accommodation which would create a hardship for that employer's operation, rather than because the legislature was intent on making the duty of accommodation contingent on the applicant making a request for accommodation.

Respondent cites Commission precedent in support of its position, but these cases are not on point. In Conley v. DHSS, 84-0067-PC-ER (6/29/87), it was significant to the Commission that complainant's own orthopedic surgeon, who "obviously was in a good position to have known what kind of accommodation, if any, would have permitted complainant to have returned to work," id. at p. 8, did not suggest an accommodation in his report on complainant's condition but stated he was eligible for sedentary work only. The Commission noted that respondent had the burden of proof on the issue of accommodation and that it had met its burden of proceeding on this issue by relying on the aforesaid letter, the taxing physical demands of the occupation, complainant's medical and work background, and the fact that at no time had complainant suggested any accommodation. At this point, the "complainant could not adduce any evidence that there was an accommodation that would have permitted him to perform as an Officer 2." Id. at p. 8, note 4. This decision does not stand for the proposition that a complainant is required to request an accommodation, but it

does illustrate that the failure to do so can enter into the evidentiary analysis that occurs in accommodation cases.[3]

Fuller v. UW, No. 78-PC-ER-55 (3/13/80), preceded the current version of the FEA. In that case, the complainant was on sick leave from February 8, 1978, to April 19, 1978. He was asked several times by his employer to submit medical reports on his condition, but never submitted anything after one early report that had suggested he try to return to work after one week. However, in subsequent letters written by complainant, he stated he had been told by his doctors he had permanent injuries and could not perform the duties of his job. Again, this case did not hold that the FEA required complainant to have requested an accommodation during the period in question, but focused on the absence of any evidence there was any way he could have returned to work.

Respondent also argues that:

> [P]lacing the burden on the Respondent to prove that reasonable accommodations were not available results in the Respondent having to try to imagine every possible suggestion that Complainant may even make, even at a hearing years down the road, no matter how frivolous, and refute every one of these unknown possibilities, without the Complainant ever having suggested a thing in advance. The assignment of burdens should not result in a guessing game ... this converts the hearing into the act of discrimination or nondiscrimination, instead of the hearing being an examination of what actually happened at the time in question. Respondent's Objections to Proposed Decision and Order, pp. 3-4.

In this case, complainant was rejected for employment as soon as she stated she was unable to read the menu cards in the existing workplace configuration. There is nothing in the record to suggest that the appointing

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[3] See also Prewitt v. USPS, 662 F. 2d 292, 27 FEP Cases 1043, (5th Cir. 1981) ("once the employer presents credible evidence that reasonable accommodation is not possible or practicable, the plaintiff must bear the burden of coming forward with evidence that suggests that accommodation may in fact be reasonably made.")

authority actually considered whether there were any reasonable accommodations available. In fact, on this record it appears that the supervisor who was effectively responsible for the hiring decision was unaware of the duty of accommodating handicapped applicants. If respondent had explored the question of accommodation at the time it was interviewing complainant, possibly by consulting with the resources available within the university as well as with complainant, and still had found it necessary to have denied her employment, there may well have been more of a focus at the hearing on what actually occurred at the time of the hiring transaction. However, under the circumstances which actually prevailed, there is no way to ascertain from merely focusing on what occurred when the hiring decision was made whether there was a reasonable accommodation available, unless the Commission were to adopt the approach espoused by respondent, discussed above, that the applicant has to suggest an accommodation in effect as an element in her case. Furthermore, even in a case where the employer actually has gone through the process of considering possible accommodations at the time of the hiring decision, the evaluation of whether the employer's decision was well-founded often will require expert testimony at the hearing, given the technical nature of many kinds of accommodation. The employer is not forced, as respondent asserts, to "try to imagine every possible suggestion the complainant may ever make ... no matter how frivolous, and refute every one of these unknown possibilities." If the complainant in his or her case asserts an accommodation that is patently frivolous, obviously the employer does not have to respond to it. If the complainant asserts an accommodation that is not frivolous but which respondent did not address as part of its main case, the employer has the right to offer rebuttal evidence that the asserted accommodation is not in fact reasonable.

In the instant case, respondent did present testimony as part of its case-in-chief that no accommodation would have been feasible. Complainant as part of her case called as a witness a Division of Vocational Rehabilitation (DVR) counselor who testified as to what in her opinion would be reasonable accommodations. These accommodations had not been addressed by respondent's expert and respondent offered no rebuttal evidence. Therefore, there is nothing in the record to contradict explicitly the testimony of the DVR counselor that these would be reasonable accommodations. The Commission cannot agree with respondent's assertion that in the factual context involved these accommodations are inherently frivolous. Respondent asserts that "enlarging the menu to the size needed to be read by the complainant is an accommodation too ridiculous to consider." Objections to Proposed Decision and Order, p. 2. This is based on the facts that complainant's vision is 20/200 and the menu currently has type less than 1/8 inch high:

> The Complainant's vision of 20 over 200 means that she can see at 20 feet what fully sighted people see at 200 feet. If she can see "normal" type at 5 inches from her eyes, then to see even the "normal" type on the menu at 5 feet away would require that type to be 12 times larger. (5 feet is 12 times farther than 5 inches). Thus, the print would need to be 1.5 inches high. If the entire menu were to be so enlarged, it would be 8.5 feet by 3.5 feet. This is a menu that is currently 1/3 of a 8.5 x 11 sheet that contains menus for three meals. The entire sheet goes to the patient for preference selection and then back to the food service personnel.

The factual basis for this contention lacks adequate support in the record, and, while arguably plausible, does not fall within the parameters of official notice. Section 227.45(3), Stats., provides, inter alia:

> An agency or hearing examiner may take official notice of any generally recognized fact or any established technical or scientific fact. (emphasis added)

The implications of complainant's 20/200 vision with respect to the question of menu enlargement involves a technical, specialized field, and the premise for

respondent's contention is outside the realm of a "generally recognized fact," and there has been no foundation in the record of what the "established technical or scientific facts" are.

ORDER

The proposed decision and order, a copy of which is attached hereto and incorporated by reference and fully set forth, is modified by changing the word "failed" in Conclusion of Law #5 on page 7 to "refused" in order to properly reflect the language of §111.34(1)(b), Stats. In all other respects, it is adopted as the Commission's final disposition of this matter at this stage of this proceeding.

Dated: Dec 17, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

STATE OF WISCONSIN PERSONNEL COMMISSION

EDNA BETLACH-ODEGAARD,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON

Respondent.

Case No. 86-0114-PC-ER

PROPOSED INTERIM DECISION AND ORDER

This complaint arises from the respondent's decision not to hire the complainant. Complainant alleges that she was discriminated against based on her handicap, in violation of the Fair Employment Act, subch. II, ch. 111, Stats. The parties agreed to the following issue for hearing:

> Whether respondents, in August and September 1986, discriminated against complainant on the basis of handicap in regard to its refusal or failure to hire her as a Food Service Worker 2 in its Hospital & Clinics food service department.

FINDINGS OF FACT

1. The complainant suffers from aniridia, the absence of an iris in her eyes, and nystagmus, the involuntary movement of her eyes from side to side. Her visual acuity is 20 over 200 in her left eye and 20 over 400 in her right eye. She is therefore able to read normal-sized type at a distance of approximately 4 to 5 inches from her eyes, without the use of any aid.

2. As a consequence of her visual impairment, complainant has received vocational rehabilitation services from counselors in the Division of Vocational Rehabilitation in the Department of Health and Social Servicers.

3. In 1983, the complainant's vision was evaluated by the Low Vision Clinic at respondent's University Hospital and Clinics, Center for Health Sciences. At that time, one of the goals of the evaluation was to determine whether the complainant would be able to perform work which required reading a cash register. Part of the evaluation included taking the

complainant to a cafeteria in the respondent's University Hospital and allowing her to sit at the cashier's chair. She experimented using a 4X monocular telescope mounted in a spectacle frame as well as using magnifying half-eye spectacles. The complainant found that it was easier for her to use the half-eye spectacles and move in closer to the documents she wished to read rather than to focus and refocus the telescope depending on the distance she was from the object she sought to see. The report of the evaluation read, in part:

> Edna Grulke [complainant] was seen in the Low Vision Clinic on March 21, 1983 for full evaluation. This patient has reduced vision due to congenital aniridia, cataracts and nystagmus. You referred Ms. Grulke to us in hopes that we could help in identifying the aids that might help her read labels, operate a cash register, and do other jobs in the area of food service.
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> We tested Ms. Grulke's distance vision at 5 feet using the Feinbloom distance acuity chart. The vision in both her right eye and left eye when tested separately was 5/25-2. An over-refraction yielded minimal subjective and objective improvement. For near vision tasks, Ms. Grulke demonstrated that she could read 1M print from a Sloan reading card at 12 cm without the use of any aid. Using a pair of +8.00 DS prismatic half-eye spectacles, the patient was able to read print of equal or similar size but more fluently and accurately than she could without an aid. Subjectively she appreciated the improved vision the glasses provided. We also determined that with the use of this aid the patient could read a bus schedule, a cash register receipt, a newspaper, and a regular print Readers Digest. We also showed the patient a +20 DS hand held magnifier and asked her to compare it to the pocket magnifier that she now uses. However, she did not report or demonstrate any noticeable improvement.
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> Since Ms. Grulke wants to be able to read a cash register or adding machin[e] at a normal working distance, we showed her a 4X Walters short focus telescope that was mounted in a spectacle frame. This monocular telescope can focus as close as 7 inches to the patient. We tried using this aid on a real adding machine and real cash register in the hospital cafeteria. Ms. Grulke found that it was easier for her to use the +8.00 half-eye spectacles we had loaned her rather than having to focus and refocus the telescope.
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> At the end of the appointment, we loaned the patient the +8.00 half-eye spectacles for her to try in her own home and in different lighting conditions. We think that this pair of glasses or a pair similar to these will allow Ms. Grulke to read fluently with a working distance of about 5 or 6 inches.

4. For the period from January of 1984 to February of 1985, and after having received 6 weeks of training from the Business Enterprise Program, the complainant served as the manager of the coffee shop in the Forest Products Laboratory. Complainant's duties included opening and closing the shop, preparing the food, ordering the food, banking and serving as cashier. The Business Enterprise Program operates food service establishments in many governmental buildings.

5. After working in various other coffee shop locations with the Business Enterprise Program, the complainant worked from January of 1986 until June of 1989 in the coffee shop at GEF 1. Her primary duty was as cashier. She also performed some duties as a short-order cook.

6. Complainant's employment history also includes some assembly line work experience, including filling gift boxes with different varieties of cheeses. When she filled the gift boxes, usually only one kind of cheese was coming down the conveyor line at a time. Complainant was able to recognize different cheeses based on their size, color, shape, label color and, depending on the size of the label, by recognizing some of the letters on the label. For example, she might recognize "M(space)D" for "MILD BRICK." None of the other assembly line work required the complainant to read information moving along the line.

7. In August of 1986, the complainant was among those persons whose names appeared on the certification list of candidates for a 6 hour per day or 75% position providing meal services for patients at respondent's UW Hospital and Clinics. The position was classified at the Food Service Worker 2 (FSW 2) level.

8. The duties of this position are reflected on the position description as follows:

50% A. Meal Assembly and Service

30% A1. Read individual menus from on-moving assembly line and place specified food items on individual trays within the time allocated. Handles approximately 10-20 separate food items for 400 patients per meal.

15% A2. Reconstitute portioned, plated food in microwave oven.

5% A3. Pass nourishments to in-patients according to written instructions.

30% B. Warewashing and Clean Up.

25% B1. Scrape food from soiled dishes and trays, unload carts, stack dishes and load into dishmachine. Stack clean dishes and sort silverware and return to assigned area.

5% B2. Clean equipment used and area of responsibility.

20% C. Portioning

10% C1. Portion and assemble appetizers, beverages, salads and desserts according to written production sheets.

10% C2. Assemble and wrap sandwiches according to written production sheets.

9. The tray line described in activity A1 is a conveyor belt which is used to convey trays containing a meal for individual hospital patients. The trays move at a constant speed past 8 different stations on the line. As the tray moves along the length of the line, various foods are added to the tray according to the information on a menu which is placed on the tray itself. The goal is to prepare 4 trays per minute of tray line operation but the actual average is between 3.5 and 4 trays per minute. At each station, the employe has about 15 seconds to read the menu, perform any portioning that is necessary and stock the tray before the tray moves on to the next station. At any given moment during the operation of the line, there are usually 6 or 7 trays on the conveyor belt.

10. Patients are typically assigned to one of the following diet categories:

General
General with no added salt
Clear liquid
Full liquid, pureed
No fresh fruit or vegetable
Controlled calorie,
No added salt, controlled cholesterol, low fat
Low fat, low cholesterol
Soft, mechanical soft

No added salt, controlled calorie

Pediatric

Each of the above diets has a separate, color-coded menu for each meal, although certain items on the menus may overlap. The menus are 3.5" by 8.5" and typically include several entries under each of the following sections: appetizers, entrees, vegetables, salad, desserts. In addition, the menus typically include a listing at the bottom for several different breads/rolls, beverages and condiments. The type on the menus is of various sizes. Sample luncheon and dinner menus, representing the first page of Respondent's Exhibit 12, are attached to this decision. Each patient circles desired food items listed on the menu. Patients are not limited to selecting only one item. Occasionally, patients will write out variations of listed items or entirely different items. These handwritten additions are not always located in one location on the menu so the Food Service Workers who dispenses the food must scan the entire menu and make sure that the requested item is consistent with the patient's diet category.

11. The first station along the tray line is the loader or starter who places a menu in a metal menu holder on a tray along with silverware and appropriate condiments. The menu faces the direction in which the tray is headed so that as it passes the stations located on either side of the tray line, the persons dispensing the food can read the menu. The tray proceeds down the line passing 6 stations before it reaches the checker who makes sure that everything selected on the menu is on the tray.

12. The August, 1986 vacancy was for a position assigned to the beverage station on the tray line. The beverage station is the last station before the tray reaches the checker.

13. Both the checker and the supervisor can stop the tray line if a difficulty is encountered in stocking a tray. The line is normally stopped fewer than 10 times per meal. Stopping the line is not desirable. All patient trays must be completed in time to allow for delivery to the patients by the personnel assigned that task. Other than the speed of the conveyor belt itself, tray line production is determined by the slowest station and slowness by one server may idle everyone else on the line. There is approximately 10 minutes available to stop the line during the period of approximately 1 hour and 45 minutes in which the tray line is operating.

14. On Saturday, August 23, 1986, complainant was interviewed for the vacant position by Helene Nelson, Food Service Administrator for patient meal services. Ms. Nelson had previously interviewed the complainant for other job vacancies. The first part of the interview took place in Ms. Nelson's office where she explained to the complainant, in general terms, the duties of the position. She then took the complainant to the tray line. In order to demonstrate the duties of the position, Ms. Nelson placed a tray on the line with a menu on it and had the complainant stand at a station on the line. The complainant picked the menu up off of the tray and held it about 6 inches from her face. Ms. Nelson stated that the people on the line had to look ahead and read the menu while it was traveling down the tray line in order to get the items ready by the time the tray reached their station and could not pick the menu up off of the tray to read it. The complainant said she was visually impaired and was unable to do that. This was the first Ms. Nelson knew that the complainant was visually impaired. Ms. Nelson concluded at this point that the complainant was unable to perform the duties of the position and the interview was ended. Ms. Nelson did not discuss whether any accommodations might be available to permit the complainant to perform the duties of the position, nor did the complainant volunteer any accommodations which she felt would be appropriate.

15. Once Ms. Nelson learned that complainant could not read the menu, she effectively disqualified the complainant from further consideration and noted on the certification list that the complainant was "not interested" in the position even though the complainant did not withdraw from consideration.

16. Another person was selected for the vacancy.

17. In September of 1986, a full-time vacation relief position became available in the patient meal service area. This position had to be able to serve in any Food Service Worker position in the meal service area, including all of the various stations on the tray line. Because the complainant's name was among those certified for the new vacancy, she was sent a letter asking her to contact Ms. Nelson for the purpose of scheduling an interview. During a telephone conversation, Ms. Nelson explained to the complainant that it was not necessary for her to come in for a second interview because she had already been in for one earlier and the respondent could just rely on the results of that interview for making a selection decision. During this

conversation, neither Ms. Nelson nor the complainant discussed possible accommodations which might allow the complainant to perform the duties of the position.

18. The complainant was not interviewed for the vacancy, respondent relied on the adverse results of the previous interview with the complainant and another person was selected to fill the vacation relief position.

19. On September 17, 1986, the complainant filed a complaint of discrimination with the Commission regarding the failure to hire her for either of the two positions.

20. Tray line duties are an integral part of the responsibilities of the two positions for which the complainant was not hired.

21. If the respondent had expanded the size of the menus or if a co-worker had given verbal cues to the complainant, she would have been able to satisfactorily perform the duties on the tray line.

CONCLUSIONS OF LAW

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

2. The complainant has the burden of proof except that the respondent has the burden with respect to the ability to perform and reasonable accommodation.

3. The respondent discriminated against the complainant based on her handicap when it did not select her for either of two vacant Food Service Worker 2 positions in 1986.

4. The complainant was unable to adequately undertake the job-related responsibilities of the positions in question without accommodation.

5. The respondent failed to reasonably accommodate the complainant's handicap.

DISCUSSION

A. Factual Disputes

The parties offered somewhat different versions of both the interview and the telephone contact between Ms. Nelson and the complainant. The

discrepancies between the testimony relating to the precise language during these conversations are inconsequential given the stipulation that the complainant never effectively withdrew her application for the positions and the admission by Ms. Nelson that when complainant said she was visually handicapped and could not read the menu, Ms. Nelson decided the complainant could not do the job. That admission established that complainant's handicapping condition was the reason the complainant was not considered further for the two vacancies.

There are two other discrepancies in the record worth noting. Ms. Nelson testified that she selected Cheryl Sullivan for the first vacancy and John Vieth for the second. According to Ms. Sullivan's employment application, admitted as Respondent's Exhibit 15, Ms. Sullivan had 4 years of experience as a clerk in the delicatessen section of a Kohl's grocery store with responsibility for both handling and displaying food. She also had 2 years of experience as a bakery clerk in a Copp's grocery store with responsibility for preparing baked goods. The discrepancy arises from the fact that the application is dated September 17, 1986, and the parties stipulated that the first interview of the complainant occurred in August of 1986. The complaint of discrimination in this matter states that the interview occurred on August 23rd. It is conceivable, but unlikely, that the position in question was not filled from August 23rd until Ms. Sullivan was interviewed after she filed the employment application that is Exhibit 15. Also, nothing in the record explains how Ms. Sullivan was considered for the vacancy if her application was filed after the certification for the position had already been prepared.

The successful candidate for the second vacancy was identified by the respondent as John Vieth, a UW graduate with food service experience at the Wisconsin Center. Again, the application form completed by Mr. Vieth is dated October 26, 1986, more than one month after the September 14th conversation between Ms. Nelson and the complainant which is the basis for the complainant's second allegation of discrimination. In light of the Commission's conclusions that Ms. Nelson had effectively disqualified the complainant because of her handicap, it is unnecessary for the Commission to compare the relative qualifications of the complainant with the successful candidate. Therefore, the question of whether it was Ms. Sullivan and Mr. Vieth or other persons who were hired for the vacancy is moot.

B. Handicap Analysis

In Harris v. DHSS, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88, the Commission stated that a typical handicap discrimination case would involve the following analysis:

> 1) Whether the complainant is a handicapped individual;
> 2) Whether the employer discriminated against complainant because of the handicap;
> 3) Whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a, Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job");
> 4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

If the complainant establishes that she is a handicapped individual and that she was not hired because of the handicap, the employer has the burden not only of proving that the handicap is reasonably related to her ability to adequately perform the job, but also the burden of proving that it has satisfied its duty of accommodation. Vallez v. UW-Madison, 84-0055-PC-ER, 2/5/87. As to the third element, unless there is a special duty of care, the standard is to a "reasonable probability." Samens v. LIRC, 117 Wis.2d 646, 662, 345 N.W.2d 432 (1984).

The first element that must be addressed is whether complainant is a "handicapped individual." There is no real dispute in this matter that the complainant is handicapped due to visual impairment. The next issue is whether respondent discriminated against complainant because of her handicap. The parties dispute whether the complainant stated during the interview that she could not do the job or whether she merely said that she could not see the menu. However, it is undisputed that Ms. Nelson did not consider the complainant further once complainant explained her handicapping condition. The reason the interview did not continue was because of the complainant's handicap. The respondent made an effort to

establish a record of the qualifications of the successful candidates although a question remains as to who was actually hired to fill the vacancies. However, Ms. Nelson effectively disqualified the complainant once she learned that the complainant could not read the menu at a distance. Ms. Nelson testified: "When [complainant] said she was visually handicapped and couldn't read the menu, I then decided she couldn't do the job because reading is a vital part of the job." Therefore, the complainant has established that she was discriminated against because of her handicap.

The third and fourth elements of analysis, ability to perform and accommodation, focus on the duties at the tray line. Respondent had a production standard of 3.5 to 4 trays per minute for the line. The complainant was unable to see the menus on the trays from the same distance as her co-workers. Her vision impairment meant that she could not focus so as to read the menus until they were about four or five inches from her eyes. The other workers on the line could read the information on the menus from a far greater distance and then gather the food to place on the trays while the trays approached their station. Both vacancies were premised on an ability to read the menus as they were coming down the line and the evidence established that the complainant could not do that. This conclusion is based in part on the testimony of respondent's expert witness, Marshall Flax, a low vision rehabilitation specialist in the respondent's Department of Opthalmology. Mr. Flax testified that it was "probably unlikely" a person with the complainant's visual acuity could perform the tray line duties at the speed in which the line was moving.[1] The respondent also suggested that the complainant would encounter difficulty in delivering the trays to the patients. However,

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[1]This opinion was offered to a degree of certainty consistent with Mr. Flax's profession. Mr. Flax further explained his opinion by stating that he had "a pretty high degree of certainty but there are people who are exceptional and this is not exactly cut and dried." Complainant objected to Mr. Flax's opinion because it was inconsistent with a standard of "professional certainty." The Commission may properly take into consideration the expert opinion offered by Mr. Flax who has spent 8 years in the field of low vision rehabilitation, working with partially sighted children and adults in an effort to find devices to help them see better. The fact that Mr. Flax qualified his opinion by stating that certain individuals were exceptional and would be able to perform does not require the Commission to strike his opinion. The opinion was appropriately phrased in terms of a "probability," rather than in terms of a possibility or conjecture. Pucci v. Rausch, 51 Wis. 2d 513, 518-19, 187 N.W. 2d 138 (1971).

respondent's expert called it a "grey area" and testified that even though the final tray preparation on the unit required the employe to do a lot within a short period of time, some persons with complainant's vision could do it and some couldn't. Therefore, respondent met its burden as to complainant's inability to perform the tray line duties but did not meet its burden as to any of the other duties of the two vacancies.

Complainant contends that in determining whether she is able to perform the requirements of the job, the respondent has utilized too narrow a requirement. Complainant suggests that instead of determining whether the complainant was able to read a menu card at a distance of 3 to 4 feet, the proper requirement is the more general one of whether the complainant "can place the correct items on the tray before the tray passes her position next to the line and without substantially slowing down the line." (Brief, p. 11) The latter standard jumps ahead so as to include the accommodation element within the question of ability to perform. Determination of whether the complainant can perform the duties of the position has to refer to the duties as the position is currently constituted rather than after any modifications necessary to permit accommodation.

The complainant contends that Mr. Flax's testimony should be ignored because "his opinion was based solely on his observation of the work site without an analysis of the abilities of the Complainant individually." (Brief, p. 12) This contention relates to the requirement in §111.34(2)(b), Stats., that a case-by-case analysis be performed of a handicapped individual's ability to perform:

> (b) In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's co-workers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

Mr. Flax's analysis met the statutory requirements in that it was based on the knowledge that complainant's visual acuity was 20/200. Had Mr. Flax only known that the complainant was handicapped or merely that she

suffered from near-sightedness, he would not have been able to conduct his evaluation on an "individual case-by-case basis." The logical conclusion of the complainant's argument is that the only way to conduct a proper evaluation of ability to perform is to place the handicapped individual in the position in question on a trial basis and see if their performance is satisfactory. Nothing in the statute suggests that the employer is required to provide such an opportunity, although in some cases this is conceivably the only effective way to conduct an individualized evaluation.

The respondent contends that the Food Service Worker 2 positions that are the subject of this complaint involve "a special duty of care for the safety of others, including the patients as well as members of the hospital and general community who eat at the hospital cafeteria." (Brief, p. 14) Pursuant to §111.34(2)(c), Stats.:

> (c) If the employment, membership or licensure involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employe or applicant can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

Because the Commission has already concluded that the complainant was unable to perform the duties of the position, it is unnecessary to address the question of whether the position in question involves a special duty of care.

The final element of analysis is the availability of reasonable accommodation which would permit the complainant to perform the duties of the job. Section 111.34(1)(b), Stats., defines employment discrimination because of handicap to include "Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business."

The respondent contends that the use of the word "refusing" indicates the legislature intended to place a burden on the employe (or prospective employe) to request accommodation:

> Under the FEA, an employer's refusal to reasonably accommodate an employe's handicap may be illegal discrimination. The definition of "refuse" is "to decline to do, accept, give, or allow". American Heritage Dictionary, 2nd College Ed. By definition, then, the act of refusing implies that a person is declining to do something that has already been requested. An employer cannot refuse an accommodation for which there has been no request. The legislature could have said "fail" instead of "refuse" and the implication of a request preceding the refusal would have been at least weaker. The word refuse must be assumed to have been selected for a purpose. (Brief, p. 10, emphasis in original)

Respondent's argument reflects a strained reading of the statute which is inconsistent with the liberal construction clause found in §111.31(3), Stats.[2] It also relies on an "implication" which is illogical. An employer who does not provide an accommodation to a prospective employe who is obviously handicapped and for whom accommodation is available and known to the employer, is still "refusing" to accommodate that person even though the applicant may not have expressly requested accommodation.

Here, witnesses testified as to the feasibility of a variety of possible accommodations for the complainant. Mr. Flax made the general statement that there were no aids which would allow someone with complainant's visual acuity to efficiently read or see accurately a moving target at an arms length, except simply allowing complainant to bring the menus to a reading distance from her eyes, i.e., 4 or 5 inches. He then went on to discuss why he had concluded the following accommodations would be unsatisfactory:

1. Telescope mounted on eyeglasses. According to the testimony of Mr. Flax, complainant could only see half of the menu sheet at a distance of 3 to 4 feet if she used a 6X magnification telescope mounted on a pair of spectacles. Mr. Flax also testified that such a telescope would have a shallow depth of field so that if the complainant focused the telescope on an object and then that object moved only 4 inches closer to or further from the complainant's eyes, the complainant would have to either reach up and refocus the telescope or move her head in order to keep the distance between her eyes and the object

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[2]In McMullen v. LIRC, 148 Wis.2d 270, 434 N.W.2d 830 (Ct. App., 1988), the court cited the liberal construction provision in §111.31(3), Stats., and held that the duty of accommodation can include a transfer if it is determined to be a "reasonable" accommodation following a case-by-case analysis of the specific facts.

object moved only 4 inches closer to or further from the complainant's eyes, the complainant would have to either reach up and refocus the telescope or move her head in order to keep the distance between her eyes and the object constant. In addition, the person wearing such a telescope must keep his or her head almost perfectly still while using the lens. Complainant's own limited experience in 1983 with telescope mounted spectacles is noted in finding of fact 3. She found it easier to use half-eye spectacles and move the object being viewed towards her than to focus and refocus the telescope. The complainant's 1983 experience also was with viewing objects at a fixed distance. Moving objects make the use of a telescope even more difficult.

2. Magnifying lenses. The 1983 report indicated that the complainant's reading ability was helped by use of magnifying lenses, referred to as +8.00 prismatic spectacles. However, in order to use these glasses, a person with 20/200 vision must still hold the material to be read a distance of 12 to 16 cm from the eyes so that the material is in focus. Therefore, the magnifying lenses would not benefit the complainant unless she also was able to bring the menu close to her eyes instead of leaving it on the tray line.

3. Hand held devices. Any hand held device would interfere with complainant's use of her hands to load the trays on the line with food.

4. Television camera with closed circuit monitor. Because the menu cards are moving, focusing the camera would be just as difficult as focusing a telescope on a moving target. The camera would have to be located at tray level but then move out of the way of food that had already been placed on the trays.

Mr. Flax noted that the one accommodation which would permit the complainant to read the menus would be to allow her to stop each tray when it reached her, pick up the menu off of the tray, read it, return it to the tray and then restart the line. He also noted that this procedure would slow down the tray line. Allowing the complainant to pick up the menus was one of several accommodations identified by Susan Slama, complainant's Division of Vocational Rehabilitation counselor. Four of the various options discussed by by Ms. Slama or identified by complainant's counsel are listed below along with a discussion of the appropriateness of the proposal in terms of its effect on the productivity of the respondent's operation.

the tray. The productivity of the line would decline. The trays for all of the hospital patients have to be completed within a specified time period of approximately 1 hour and 45 minutes so that they could be carted to the various hospital units. The schedule only allows the line to be stopped for 10 minutes of this period. Ms. Nelson also testified that repeated stops of the tray line could damage the conveyor belt.

2. Picking up the menu without stopping or slowing the line. This option unrealistically assumes that the complainant would not spend any more time picking up the menu, bringing it to her eyes so she could read it and returning it to the tray than a person with normal vision would spend reading the menu while the tray was moving. In addition, if one person on the line picked up a menu to read it, co-workers behind or on the other side of the tray line would be unable to see the card until the menu was returned to the tray. Stations on the line are close together and on both sides of the tray line so this would interfere with the co-worker's performance.

3. Permanent assignment as checker on the line. The checker is the last station on the tray line so the person in this position could pick up the menu without interfering with the work of the other persons on the line. However, Ms. Nelson testified that the checker has to compare all of of food on the tray with the menu entries to make sure that nothing has been missed and that the particular items are all consistent with the patient's general diet. The checker is therefore selected because of their quickness, both in terms of being able to look quickly and to think quickly. She also testified that a permanent assignment to the checker position would have to comply with the bargaining agreement which prohibits the respondent from moving people into just any job.

4. Permanent exemption from performing tray line duties. Ms. Nelson testified that during the operation of the tray line, all of the persons on the shift are working on the line, except for two persons who go home half-way through the tray line operation. Therefore, there are no other employes with whom the complainant could exchange responsibilities.

Ms. Slama identified two other accommodations which would possibly allow the complainant to work on the tray line: enlarging the menu and having the person immediately in front of the complainant give the complainant a verbal cue. The context of these and the other possible

accommodations identified by Ms. Slama is explained by the following transcription of the relevant portions of Ms. Slama's testimony:

> Question (by complainant's counsel): As part of your job responsibilities with the Department of Vocational Rehabilitation, is it your job to develop or to suggest possible job site accommodations?
>
> A I have been asked for that information, yes, and I have offered that information when requested.
>
> Q You have experience doing that, or ... and do you have any specific training?
>
> A For on-site analysis? Yes, I have experience doing that. On numerous occasions in the Rock County area and we have received in-service instruction on how to handle those types of job analysis. And I have also completed formal training. One day and up to five-day conferences which dealt with that type of assessment.
>
> * * *
>
> Q Given the information provided by Ms. Nelson today, are there accommodations that you believe that could be made to allow, that would have allowed Ms. Odegaard to perform the job? To perform the job?
>
> A Yes I do.
>
> Q Particularly with respect to the conveyor belt or assembly area?
>
> A Possible, possibilities would be, as Edna I believe indicated, would be to give her the opportunity to try to perform those tasks. Another possible accommodation, and one that we've ... other employers have considered, would be since that is just one portion of the day is spent on that line, would be for her to swap job responsibilities with someone else. For example, we hired transcriptionist in our office who was totally blind. Twenty-five percent of the time was ... for that position officially was spent opening up mail, which she was unable to do, unable to open it up and distribute it. So another worker in the office gave her additional transcription work and took on the opening up the mail responsibility. And if the person can handle 75% of the job, I don't think it is unreasonable. I think Ms. Nelson mentioned a couple examples of how other employes have been accommodated.

Q Are there ... were there specific things that could be done on the conveyor belt site or in that operation that could be adapted for Ms. Betlach-Odegaard?

A It's possible. Consideration could be given to when the next time forms are printed, enlarging the forms. Consideration could also be given to have the person to her left, if that is the direction the line is moving from, give her a verbal cue. We have seen that done at Swiss Colony and some local manufacturing companies. Consideration could also be given, I don't know the reason why the card couldn't be picked up, but it is possible for her to see the card, from her own testimony, as it would be coming down towards her, she could reach for it in advance as it came from that direction, look at it, put it down and conceivably get the articles she needs to put on the tray without even disturbing the line.

Q You haven't viewed the specific job site, is that correct?

A No.

Q You have, however, viewed Ms. Betlach-Odegaard's work abilities elsewhere.

A Yes, I have.

Q And her adaptability to different circumstances?

A Yes, I have.

* * *

Q Do you have an opinion to a professional degree, to a degree of certainty consistent with your professional status?

A Yes I believe she could handle that job. We have discussed some reasonable accommodations.

* * *

Question (by respondent's counsel): So your professional opinion, too, is not based upon a complete analysis of the situation, is that right?

A I have given my opinion based on my involvement as a rehabilitation counselor.

Q Could you repeat the answer you gave before the tape ran out?

A OK. I did not ... you asked me if I had been on the job site. No, I had not.

> A And then I asked you whether your professional opinion too was based on an incomplete analysis of the situation.
>
> Q It would have been beneficial to have seen the job site, but I am not here as a ... that type of expert, I am here just to comment on my involvement previously.

The only testimony offered by the respondent directly relating to these proposals was by Ms. Nelson. She testified she had not considered the possible effect enlarging the menu might have on hospital operations and, as to the second proposal, she did not know how preoccupied the other tray line employes would be with their own duties. Mr. Flax made the general statement that there was nothing which would allow someone with 20/200 vision to efficiently read or see accurately at a distance of an arms length, especially with a moving target. However, the burden of proof is on the respondent in this matter. Mr. Flax's general statement was made prior to the point in the proceeding that Ms. Slama identified her possible accommodations, and Mr. Flax's comments and opinions focused on technical accommodations rather than on non-technical accommodations such as were suggested by Ms. Slama. The respondent offered no testimony which could serve as a basis for a conclusion that these two possible accommodations were unreasonable, i.e. that they would either be ineffective in providing the complainant with the information found on the menu or that they "would pose a hardship on respondent's program, enterprise or business." For that reason, the Commission must conclude that the respondent failed to sustain its burden and that the respondent refused to reasonably accommodate the complainant.

Remedy

After making a finding of discrimination, the Commission is to order "such action by the respondent as will effectuate the purpose of [the Fair Employment Act], with or without back pay." §111.39(4)(c), Stats. The act also provides that interim earnings reduce any back pay award. The only testimony offered by complainant which arguably related to the question of remedy was a description of the salary range associated with employment as part of a Business Enterprise Program. The only reference to remedy in the parties post-hearing briefs is complainant's request that she be granted "the relief sought under the Act." There appears to have been an implicit

agreement by the parties to have delayed the topic of remedy until such time as a finding of discrimination was made. Therefore, the parties will be contacted for the purpose of scheduling a conference regarding the question of remedy.

ORDER

Based upon the finding that the respondent discriminated against the complainant on the basis of handicap with respect to the decisions not to select her for vacant Food Service Worker 2 positions in August and September of 1986, the Commission will contact the parties to schedule a conference on the issue of remedy.

Dated:_____, 1990 STATE PERSONNEL COMMISSION

_____
LAURIE R. MCCALLUM, Chairperson

KMS:kms

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

Parties:

Edna Betlach-Odegaard
c/o Clifford E. Blackwell III
121 S. Hamilton Street
Madison, WI 53703

Donna Shalala
Chancellor, UW-Madison
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706

GENERAL MENU

Name _____
Unit ____ Room _____
Please circle your menu choices
by 11:00 a.m.

TUESDAY II LUNCHEON

Appetizers

Pineapple Juice
French Onion Soup

Entrees

Sliced Turkey, Gravy, Cranberry Sauce
Tuna Noodle Casserole
Gourmet Hamburger/Bun
Swiss Cheese Sandwich on Rye/Doritos

Vegetables

Mashed Potatoes, Gravy
Buttered Green Beans
Buttered Corn

Salad

Cottage Cheese & Tomato Salad

Desserts

Pumpkin Cream Cheese Torte
Chilled Peaches
Fresh Fruit

Homestyle Dinner Roll

White Bread	Whole Milk	Coffee
Wheat Bread	2% Milk	Tea / Lemon
Butter	Skim Milk	Decaf
Margarine	Mustard	Creamer
Mayonnaise	Catsup	Yogurt

UW HOSPITAL & CLINICS

GENERAL MENU

Name _____
Unit ____ Room _____
Please circle your menu choices
by 11:00 a.m.

TUESDAY II DINNER

Appetizers

Cheese Soup, Crackers
Apple Juice
Cheese, Crackers

Entrees

Baked Pork Chop, Gravy
Baked Haddock/Lemon Wedge
Chef's Salad/Hard Roll, 1000 Island Dressing
Turkey Pastrami on Wheat

Vegetables

Sage Dressing, Gravy
Mashed Potatoes, Gravy
Buttered Lima Beans and Tomatoes
Buttered Broccoli/Lemon Wedge

Salad

Golden Glow Salad (Lemon Gelatin,
Carrot and Pineapple Salad)

Desserts

Raspberry Sherbet
Homestyle Applesauce Cake
Fresh Fruit
Rose Wine (by physician order)
White Wine (by physician order)

White Bread	Whole Milk	Coffee
Wheat Bread	2% Milk	Tea / Lemon
Butter	Skim Milk	Decaf
Margarine	Mustard	Creamer
Mayonnaise	Catsup	

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