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JOAN ENGEL,

Complainant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM (Oshkosh),

Respondent.

Case No. 89-0103-PC-ER

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DECISION
AND
ORDER

Nature of the Case

This is a complaint of discrimination on the basis of age and handicap. Complainant requested a waiver of the investigation stage of these proceedings and the Commission granted this request. A hearing was held on May 15, 1992, before Lauric R. McCallum, Chairperson.

Findings of Fact

1. Some time on or around January 20, 1989, the Department of Employment Relations forwarded to the University of Wisconsin-Oshkosh (UW-O) a list of candidates certified as eligible for a vacant Program Assistant 1 (PA 1) position in Testing and Research Services. This list included complainant's name and indicated that her name appeared on the list as the result of Handicapped Expanded Certification. Diane Bunck of the UW-O Personnel Office received this list and contacted the certified candidates by letter to determine their interest in interviewing for the position. Based on the responses she received to this letter, Ms. Bunck prepared an interview schedule which she forwarded to Dr. Timothy Hoyt, the supervisor of the PA 1 position. Neither Mary Koepp, the UW-O Personnel Director and Ms. Bunck's supervisor, nor Dr. Hoyt were provided a copy of the certification list. Ms. Bunck became aware before the effective date of complainant's hire that complainant's handicap of depression had been properly verified but she did not communicate this information to Ms. Koepp or Dr. Hoyt.

2. Thirteen candidates for the PA 1 position were interviewed by Dr. Hoyt. Dr. Hoyt selected complainant as the successful candidate based on her work experience and her maturity. Complainant was appointed to the position effective March 7, 1989, and required to serve a six-month probationary period.

3. This PA 1 position was one of two positions within the Testing and Research Services unit assigned to the Faculty Evaluation function. The purpose of this function was to coordinate the administration of the student evaluation of the teaching faculty. The results of these evaluations had an impact on faculty merit pay, tenure decisions, and promotions. An important part of this function was to direct the student employees who carried out some of the duties and responsibilities of the faculty evaluation program and to maintain smooth and cordial working relationships with the faculty being evaluated. Occasionally, the incumbent of this PA 1 position was required to come in before office hours or stay after office hours to coordinate an evaluation.

4. During her second week of employment, complainant became ill and remained out of work for 7 working days. During this time, complainant was hospitalized for "multiple pulmonary emboli." Dr. Hoyt was under the impression that complainant's absence was due to an illness that she had contracted in Florida a few weeks before she started working at UW-O. Dr. Hoyt was not aware of the nature of this illness at any time during complainant's employment in the subject PA 1 position. Upon her return to work, complainant worked a part-time schedule for 6 working days and a full-time schedule thereafter. Complainant had been given an "Employee Return to Work Certificate" from her treating physician which indicated that she could return to work "with restrictions" and that the only restriction was that she work "hours as tolerated." Neither Ms. Koepp nor Dr. Hoyt saw this certificate at any time prior to the subject termination. Some time in May of 1989, complainant advised Dr. Hoyt that she was feeling like her "old self" again.

5. On or around May 7, 1989, Dr. Hoyt prepared an evaluation of complainant's work performance during her first two months in the subject PA 1 position. This evaluation stated as follows, in pertinent part:

* * * *

You are making satisfactory progress in the mechanical aspects of the job. You must, however, take steps immediately to improve the perception of your treatment of clients, student staff members, and others in the daily conduct of your job. This criticism is based in part, but is not limited to, several complaints that have reached me from the student staff whom you supervise regarding the manner in which you talk to them and the tasks you ask them to do. Some have decided not to return to this office next fall as a result of your methods of supervision.

The importance of the work done by student staff who administer the classroom surveys cannot be overemphasized. Your reputation, and the reputation of our office, to a large degree, is dependent on the impressions made by the student staff. Consequently, they deserve to be treated with respect and consideration. Their supervisor should consist of a combination of caring and nurturing, job accountability, thorough training, and careful explanation of duties and tasks to be performed.

* * * *

The nature of your job demands exceptional accuracy in written and oral communication with teachers, student staff, Mary, and Me. Miscommunication, especially with client teachers and Mary, can result in surveys that are administered and/or processed incorrectly. It is reasonable to expect "glitches" to occur during your first semester. It appears that you have thus far handled the unexpected and the out-of-the-ordinary in a reasonable manner. It is an area, however, that requires concentration and constant effort. You should continue to seek ways to improve the accuracy and flow of information, to clarify communication outside and inside the office, and to simplify tasks related to the survey function.

* * * *

Among 13 applicants for the job, I judged you as the person most able to be effective at both levels. Although your first two months began on a rough note because of your health problems, you appear to be learning more and feeling better each day.

Dr. Hoyt rated complainant's quality of work, judgment, quantity of work, and dependability as "average" (the middle rating on the five factor scale); her initiative, rate of learning, and work habits as "good" (the second highest rating on the five factor scale); and her ability to get along with others as "average" to "poor" ("poor" is the second lowest rating on the five factor scale). Complainant signed this evaluation on May 24, 1989. Dr. Hoyt considered a rating of "average" to be a very low rating. Dr. Hoyt's practice was to review a written performance evaluation with an employee and to provide

detailed specifics to illustrate what is intended or referenced in the written comments. Prior to the completion of this evaluation, complainant's co-worker in the Faculty Evaluation unit expressed concern to Dr. Hoyt regarding complainant's ability to pull her weight on the unit and other co-workers had expressed to Dr. Hoyt their feeling that complainant was not always courteous or helpful to faculty or staff

6. On or around August 17, 1989, Dr. Hoyt brought his continuing concerns regarding complainant's work performance to the attention of Ms. Koepp. Ms. Koepp suggested that Dr Hoyt complete another evaluation of complainant's work performance. Dr. Hoyt requested that complainant's probationary period be extended for an additional three months and Ms. Koepp told him that she would determine the circumstances under which such an extension could be approved.

7. Dr. Hoyt and Ms. Koepp met again on or around August 18, 1989. At this meeting, Ms. Koepp advised Dr. Hoyt that she didn't feel that the circumstances of complainant's employment satisfied the criteria for the approval of an extension of a probationary period and that, since the performance problems were not task-oriented but related to complainant's ability to get along with others, were unlikely to show improvement if an extension were granted. In addition, when Ms. Koepp and Dr Hoyt determined that a three-month extension would expire during a very critical and busy point in the fall semester for the Faculty Evaluation program, they concluded that such an extension would not benefit the program. Ms. Koepp and Dr. Hoyt decided on these bases not to extend complainant's probationary period for three months.

8. Immediately after his discussion with Ms. Koepp of August 17, 1989, Dr. Hoyt prepared an evaluation of complainant's performance for the three-month period ending August 7, 1989. This evaluation stated as follows, in pertinent part:

* * * *

The progress expected in terms of general job performance and rapport with clients and staff has improved since your last evaluation, where such expectations were given in detail, but has not reached the level necessary, in my judgment, to warrant satisfactory completion of probation.

* * * *

Dr. Hoyt rated complainant's quality of work, quantity of work, dependability, initiative, and work habits as "average;" her judgment and rate of learning as "poor," and her ability to get along with others as "poor" to "unsatisfactory" ("unsatisfactory" is the lowest rating on the five factor scale). Complainant did not sign this evaluation. During his discussion of this evaluation with complainant on August 17, 1989, Dr. Hoyt did not tell complainant that her work was "all right" (this would have been inconsistent with the language of the written performance evaluation) or that, if she were starting the job that day, he was sure she would complete her probationary period "with flying colors" (this is not language that Dr. Hoyt uses).

9. Some time after August 18, 1989, Ms. Koepp met with complainant to discuss Dr Hoyt's recommendation that complainant be terminated. During this meeting, Ms. Koepp specifically referred to complainant's performance problems, offered complainant the opportunity to resign, and specifically referred to the non-discrimination requirements of state law. This was consistent with Ms. Koepp's usual practice.

10. In a letter to complainant dated August 23, 1989, Ms. Koepp advised her that her employment in the subject PA 1 position was terminated effective August 18, 1989

11. It is not unusual for a UW-O supervisor to complete two performance evaluations of a probationary employee during the employee's six-month probationary period. It is not unusual for a probationary employee at UW-O to be terminated prior to the end of the employee's six-month probationary period.

12. Dr Hoyt never referred to complainant's age nor was he aware that anyone under his supervision had done so. Complainant never told Dr. Hoyt that any of her co-workers had mentioned her age or that any of her co-workers were "harassing" her about her age

13. The limited term employee (LTE) who had held the subject PA 1 position prior to complainant had not consistently required that the students coordinating the faculty evaluations follow the appropriate script when instructing the evaluators. Dr. Hoyt discovered this and rectified the situation by insisting that the LTE require the students to follow the script.

14. Complainant's date of birth is January 10, 1930.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden to show that she was discriminated against on the basis of her age in regard to her probationary termination from the subject PA 1 position.
3. The complainant has failed to sustain this burden.
4. The complainant has the burden to show that she was discriminated against on the basis of her handicap in regard to respondent's decision not to extend her probationary period.
5. The complainant has failed to sustain this burden.

Opinion

The issues in this case are as follows:

Whether respondent discriminated against complainant on the basis of age with respect to its decision to terminate her employment.

Subissue: Whether respondent's decision not to extend complainant's probationary period was discriminatory on the basis of her handicap

Age Discrimination

In analyzing a claim of disparate treatment such as the one under consideration here, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

In the context of a termination decision, the elements of a prima facie case are that (1) the complainant is a member of a protected class; (2) her work performance was satisfactory; (3) despite this satisfactory performance, she was terminated; and (4) this termination was effected under circumstances which give rise to an inference of discrimination. Under the facts of this case,

complainant was a member of a protected class on the basis of her age (59). In regard to the second element, complainant has not shown that her performance was satisfactory. The only evidence presented by complainant in this regard was her testimony that she felt that her work performance had been satisfactory, and that she could not recall any work situations in which she would characterize her behavior as not courteous or not helpful. The record shows that Dr. Hoyt testified that he had received complaints from complainant's co-workers and student subordinates about her lack of courtesy and lack of helpfulness and her failure to carry her weight in the unit. The record also shows that this testimony was consistent with the language in the two evaluations Dr. Hoyt prepared in regard to complainant's work performance and with the substance of the conversations Ms. Koepp testified that she had had with Dr. Hoyt. Neither party introduced any other evidence relating to complainant's work performance, including any testimony from complainant's co-workers or the program's clients. In view of the state of the record in regard to this point and in view of the fact that the complainant has the burden of proof, the Commission concludes that complainant has failed to show that her work performance was satisfactory. In regard to the third element, the record shows that complainant was terminated. In regard to the fourth element, since the record does not indicate the age of the employee appointed to replace complainant in the subject PA 1 position or any other evidence which would tend to give rise to an inference of discrimination, the Commission concludes that complainant failed to sustain her burden in regard to this element as well. The complainant has failed to show a prima facie case of discrimination on the basis of her age.

If complainant had shown such a prima facie case, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its termination of complainant. The reason offered by respondent is that complainant's work performance was unsatisfactory and this reason is legitimate and non-discriminatory on its face.

The burden would then shift to complainant to show that the reason offered by respondent was a pretext for discrimination. In this regard, complainant argues as follows:

1. Her performance was actually satisfactory. As discussed above, based on the state of the record and the fact that complainant has the burden of

proof, the Commission concluded that her work performance was actually not satisfactory.

2. Dr. Hoyt told complainant during their discussion of the second performance evaluation that her work was "all right" and that, if she were starting the job that day, he was sure she would complete her probationary period "with flying colors." However, not only is this inconsistent with the message of the two written evaluations of complainant's work performance completed by Dr. Hoyt and with the substance of Dr. Hoyt's discussions of complainant's work performance with Ms. Koepp, as corroborated by Ms. Koepp's testimony, but Dr. Hoyt testified that this was not the type of language he uses and he would never have said that. Complainant has failed to show that Dr. Hoyt made the alleged statements.

3. Dr. Hoyt used positive and encouraging statements during his and complainant's discussion of the first performance evaluation. Dr. Hoyt acknowledged in his testimony that he did this in addition to pointing out the areas that were unsatisfactory and needed improvement. This is consistent with Dr. Hoyt's analysis in the written performance evaluation. Certainly, it is not unusual or misleading for a supervisor of a probationary employee to point out both the satisfactory and unsatisfactory areas of performance and to offer encouragement to the employee with the hope that such encouragement could spur the employee to improve his or her performance. These statements do not tend to show pretext.

4. Complainant was so conscientious about her job that she worked outside normal office hours to assist the faculty. However, the record shows that working outside normal office hours was expected of this position in certain circumstances and does not show any special commitment or performance on complainant's part.

5. One of complainant's co-workers mentioned her age on more than one occasion and actually "harassed" complainant about her age. The record does not show that Ms. Koepp or Dr. Hoyt, the two individuals who participated in the decision to terminate complainant, made any statement to complainant about her age or were aware that anyone else had made such a statement. In addition, the record does not show that complainant brought any such situation to the attention of Ms. Koepp or Dr. Hoyt prior to her termination.

6. Dr. Hoyt failed to do a written evaluation of complainant's performance at the fourth month of her probationary employment. The record shows, however, that, although Dr. Hoyt has done a four-month evaluation of some of his subordinate employees, at least half of the time he only does two evaluations during the six-month probationary period, as he did with complainant. This does not tend to demonstrate pretext.

7. Ms. Koepp's insistence that complainant resign from the subject PA 1 position in lieu of termination. The record does not show that Ms. Koepp insisted that complainant resign from her position. The record does show that Ms. Koepp, consistent with her usual procedure, offered complainant the opportunity to resign. It does not make sense that offering an employee who is about to be terminated, with all the negative present and future ramifications that action carries with it, the opportunity to have their work record indicate a resignation rather than a termination, should connote, in and of itself, an intent on the part of the employer to discriminate.

8. Ms. Koepp's mention of the non-discrimination requirement during her discussion with complainant. The record shows that this, too, was consistent with Ms. Koepp's usual procedure. Again, the simple mention of an anti-discrimination requirement, without more, does not necessarily or even easily lead to a conclusion of an intent by the employer to discriminate.

9. Complainant was terminated prior to the end of her probationary period. The record shows that this was not an unusual practice at UW-O when a supervisor feels that a probationary employee is not working out. Complainant has failed to show why it should be considered as evidence of pretext in this case.

10. According to complainant, Dr. Hoyt likes to work around "pretty college girls." Not only did complainant not offer any evidence to corroborate this statement, but such a conclusion would be inconsistent with Dr. Hoyt's decision to hire complainant in the first place.

The Commission concludes that complainant has failed to establish a prima facie case and has failed to show pretext. As a result, the Commission concludes that complainant has failed to show that respondent discriminated against her on the basis of her age in regard to the subject termination.

Handicap Discrimination

As the Commission stated in Harris v. DHSS, Case Nos. 84-109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will 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 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.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "handicapped individual" as an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such an impairment; or
- (c) Is perceived as having such an impairment.

Complainant did not offer any evidence, other than the fact that her depression served as the basis for her qualification for Handicapped Expanded Certification (HEC), that her depression constituted a handicap under the Fair Employment Act (FEA). This is not conclusive since the definitions of handicap under HEC and the FEA are not identical.

In addition, the only evidence offered by complainant in regard to her "multiple pulmonary emboli" handicap was that it required a short hospitalization, 7 working days away from the office, 6 shortened working days, and a period of several weeks thereafter during which complainant was required to

keep her legs elevated. Complainant has failed to show that this temporary incapacity had any lingering symptoms or any tendency, after the recovery period mentioned above, to make achievement unusually difficult or limit her capacity to work. The record also shows that Dr. Hoyt was unaware of the exact nature of complainant's illness and perceived it to be a temporary incapacity. This is consistent with complainant's statement to Dr. Hoyt in May of 1989 that she was feeling like her "old self" again. Complainant has failed to show that this illness qualified as a handicap within the meaning of the FEA.

If complainant had shown that she was handicapped, the next issue would be whether the respondent discriminated against the complainant because of one or both of her handicaps. There are two ways that discrimination on the basis of handicap under this element can occur. The first would occur if respondent's failure to extend complainant's probationary period had been motivated by complainant's handicap. The second would occur if respondent failed to extend complainant's probationary period for performance reasons that were causally related to her handicap. See Conley v DHSS, 84-0067-PC-ER (6/29/87)

In proving discrimination pursuant to the first model, complainant would first have to prove that respondent was aware or should have been aware of complainant's handicap. The record does not show that either Dr. Hoyt or Ms. Koepp, the two individuals involved in the decision not to extend complainant's probationary period, were aware or had any reason to be aware of complainant's depression. The record does not show that complainant told either Ms. Koepp or Dr. Hoyt of her depression. The only writings referred to in the record which mentioned complainant's depression were the certification list for the subject PA 1 position and a letter prepared by Ms. Bunck after the hiring decision was made. The record does not show that Dr. Hoyt or Ms. Koepp ever saw or had any reason to see either of these documents.

The record does show that Dr. Hoyt was aware that complainant became ill soon after she began work in the PA 1 position and that Ms. Koepp became aware of this prior to complainant's termination when she reviewed the first performance evaluation prepared by Dr. Hoyt. However, the record does not show that either Dr. Hoyt or Ms. Koepp was aware of the exact nature of complainant's illness or that they perceived it as anything more than a temporary

incapacity from which complainant had recovered some time during May of 1989.

There is no evidence in the record which would tend to indicate that this perception played any role in their decision not to extend complainant's probationary period. The record shows that Ms. Koepp reviewed §§ER-Pers 13.02 and 13.05, Wis. Adm. Code, to determine if extending complainant's probationary period would be consistent with these administrative rules. These rules provides as follows, in pertinent part:

ER-Pers 13.02. All probationary periods shall be for 6 months duration, except:

* * * *

(2) In the case of employees who have not demonstrated the capacity to be granted permanent status in class within 6 months after the beginning of an original or promotional probationary period, the administrator may, at the request of an appointing authority, extend the probationary period for up to 3 additional months, provided the extension is desirable on the basis of factors such as:

(a) Unanticipated change in the program or duty assignment, or

(b) Substantial change in performance.

ER-Pers 13.05. (1) If an employe has absences from employment not exceeding 174 work hours or prorated portion for part-time employes for any reason approved by the appointing authority, the appointing authority shall determine whether such absence shall be waived from the probationary time or the probationary period is to be extended to cover such absence. The employe shall be given written notice of such extension.

(2) If an employe has such absence from employment totaling more than 174 work hours or the prorated portion for part-time employes, the probationary period shall be extended by the length of the time absent, except that up to 174 work hours or prorated portion for part-time employes may be waived by the appointing authority.

Ms. Koepp and Dr. Hoyt concluded that there had been no unanticipated change in the program or duty assignment for appellant's position and that there had been no substantial change in performance. These conclusions are consistent with the record and do not appear to be disputed by complainant. In

addition, Ms. Koepp and Dr. Hoyt were aware that complainant had been absent less than 174 hours and the extension of her probationary period was discretionary as a result. In this regard, Ms. Koepp and Dr. Hoyt concluded that, since complainant's performance problems related primarily to her interactions with other people and this is not the sort of problem which tends to improve over time, extending her probationary period for 3 months was unlikely to effect any change in her performance. In addition, Ms. Koepp and Dr. Hoyt were aware that the three-month extension would expire during the busiest time of the semester for the faculty evaluation program and having a vacant position at that point in time, if complainant were unsuccessful in improving her performance, would pose a hardship to the program. These reasons for not extending complainant's probationary period are all legitimate and non-discriminatory on their face. The only arguments offered by complainant to show that these reasons were a pretext for discrimination on the basis of her handicap were those arguments offered in relation to her termination and which were analyzed above. As concluded above, none of these arguments tended to show pretext in the context of a termination. A review of these arguments in the present context shows that they also do not tend to show pretext in the context of a decision not to extend complainant's probationary period and the Commission so concludes. Complainant has failed to show that she was discriminated against on the basis of handicap under the first model.

Under the second model, complainant could show discrimination on the basis of handicap if she were to show that the performance problems which served as the basis for respondent's decision not to extend her probationary period were causally related to her handicap. The record fails to show what the symptoms of complainant's depression were and how they affected her ability to perform the duties and responsibilities of her PA 1 position. The record does show that complainant's multiple pulmonary emboli resulted in her absence from work for a period of time but fails to show how, after her return from this absence, this condition affected her ability to do her job. In addition, a conclusion that a causal relationship existed would be inconsistent with the fact that the record shows that complainant's performance problems were present during her entire employment in the PA 1 position, even after May of 1989 when she acknowledges that she was feeling like her "old self" again, i.e. when she acknowledged that she was no longer suffering from the

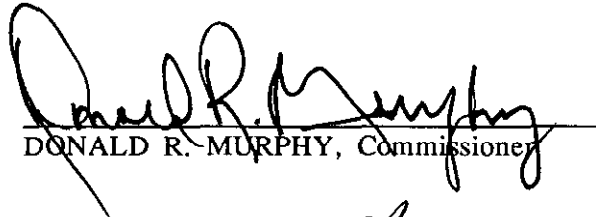
symptoms of multiple pulmonary emboli. The Commission concludes that complainant has failed to show a causal relationship between either of the claimed handicaps and her performance problems.

Based on the above, the Commission concludes that complainant has failed to show that she was discriminated against on the basis of her handicap as alleged. In view of the conclusions already reached by the Commission in regard to complainant's claim of handicap discrimination, it is not necessary to complete the remaining part of the Harris analysis.

Order

This complaint is dismissed.

Dated: August 26, 1992 STATE PERSONNEL COMMISSION
LRM/lrm/gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all

parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.