STATE OF WISCONSIN | PERSONNEL COMMISSION

JUDITH FARRAR,
Complainant,

v.

Attorney General, DEPARTMENT OF JUSTICE,
Respondent.

Case No. 94-0077-PC-ER

FINAL DECISION
AND ORDER

NATURE OF THE CASE

This case involves a complaint of handicap and retaliation[1] discrimination with respect to certain conditions of employment and an alleged constructive discharge, filed on May 2, 1994. Complainant appealed an initial determination of "no probable cause" to believe discrimination had occurred. The issues for hearing were set forth in the pre-hearing conference report dated June 6, 1996, as follows (withdrawn issues deleted):

> 1. Whether there is probable cause to believe that respondent discriminated against complainant in 1993-94 on the basis of handicap with respect to those terms and/or conditions of her employment addressed in the initial determination dated February 17, 1996.
>
> 2. Whether there is probable cause to believe that respondent failed to reasonably accommodate complainant's handicaps in 1993-94 in the manner addressed in the February 17, 1996, initial determination. . . .
>
> 5. Whether there is probable cause to believe that respondent constructively discharged complainant in the manner set forth in the initial determination dated February 17, 1996.

Several weeks after the due date for complainant's post-hearing reply brief, she filed two stacks of material, in total approximately two feet high. This material goes far beyond a reply brief, including much evidentiary material. Under these circumstances, these untimely submissions will not be considered as part of the record before the Commission.

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[1] Complainant's post-hearing brief withdrew the claims related to retaliation.

FINDINGS OF FACT

1. At all times relevant to this charge of discrimination, complainant has had arthritis, carpal tunnel syndrome, and osteoporosis, and has been an alcoholic.

2. Complainant began her employment with respondent in January 1991 in the Crime Information Bureau (CIB) as a Data Entry Operator 1. This was a permanent project appointment, which meant that complainant had eligibility to transfer to another position once the project position was terminated.

3. Complainant's work involved the data entry of criminal records. She was employed on the second shift, which had been created on a project basis to deal with a substantial backlog of work.

4. Because of operational program reasons, complainant had a number of different supervisors during her employment with respondent—Steve Barry, Dot Franzen, Heather Falk, Kathy Lux, and Byron Bishop. Due at least in part to the fact that for part of the time period the supervisor did not actually work the second shift, complainant at one time also had a lead worker—Richard Urban. The CIB director was Robert McGrath throughout the period of complainant's employment with respondent.

5. Byron Bishop once told complainant not to use the office phone for personal phone calls when he overheard her making a personal phone call. This was not a reprimand. Mr. Bishop did not monitor complainant's phone calls, but inasmuch as he used a line to which they both had access, there were times when he would pick up his phone to make a call when complainant was already on the line.

6. Respondent had a policies and procedures manual available to employes, although individual employes did not receive copies. At one point complainant was using an agency copier during her working hours to make a copy of this document for her own use, and Mr. Bishop told her that this was not appropriate. Complainant could have had acquired a copy of this manual for herself by paying the cost of copying.

7. Mr. Bishop frequently had to adjust complainant's leave slips because they had not been completed properly. Respondent never inaccurately altered complainant's leave slips.

8. One Christmas complainant had some personal pictures missing from her work area. Complainant did not complain to management about this situation, and it was not investigated by management.

9. At one point, respondent became involved in a special project which gave the employes in complainant's unit the opportunity to work overtime, and which involved the monitoring of the production of the employes in question. Complainant was not offered the opportunity to work this overtime because her production was lower than the other employes in the unit, and management decided it would not be beneficial to have her in overtime status because of her limited output.

10. Patricia Miller is a personnel specialist who also served as the EAP (Employe Assistance Program) resource coordinator. Respondent's policy is that EAP contacts are to be confidential. Ms. Miller was involved in an attempt to mediate a dispute between complainant and her lead worker, Richard Urban. This mediation effort had nothing to do with the EAP program. Ms. Miller did not divulge any EAP information concerning complainant.

11. Complainant injured her back at work while handling files in the file room on June 14, 1991, and on October 8, 1991. Complainant pursued worker's compensation claims with respect to both of these injuries.

12. Complainant presented to respondent an untitled form signed by Dr. McAweeney dated June 17, 1991, which stated she could return to work on June 18, 1991. The space on the form for "restrictions" had nothing filled in.

13. After complainant continued to complain of back pain to Dr. McAweeney, he completed another form directed to respondent and dated July 11, 1991, which stated in the "restrictions" section: "no filing."

14. With respect to the October 8, 1991, injury, she was treated in an emergency room on October 9, 1991, and the attending physician completed a form entitled

"return to work recommendations record" which stated the doctor recommended complainant's return to work on October 9, 1991, with "no limitations." She subsequently saw Dr. McAweeney, who recommended her return to work on a part-time basis on October 28, 1991, and to continue on a part-time basis through November 20, 1991. In a worker's compensation form signed November 22, 1991, in the section entitled "current work performance limitations," Dr. McAweeney checked the box for "Sedentary Work," which is described as: "Lifting 10 pounds maximum and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools. . . ."

15. A letter of February 3, 1993, from Dr. McAweeney to Heather Falk, complainant's supervisor, includes the following: "She is unable to do the work required of her to work in the file room at this time."

16. At no time during the period of 300 days prior to the date complainant filed her charge of discrimination on May 2, 1994,[2] did complainant request of management that she not have to perform any work involving files.

17. On a prescription form dated May 5, 1993, Dr. McAweeney stated: "Judith Farrar should be in work station with a lower keyboard because of carpal tunnel and out of air conditioning because of arthritis."

18. In response to this document, respondent moved complainant to a work station located on the outside of the building, and that was out of the flow of the central air conditioning system, but which had a separate air conditioning unit, and that had a height-adjustable keyboard.

19. In a June 1, 1993, memo from complainant to Dot Franzen (Complainant's Exhibit O), complainant stated that "nothing seems to be being done about the request for a non-air conditioned work space, and that "I am ordered by my doctor to sit in an area that has heat because of medical conditions. . . ." Included with this memo was a number of recommendations by complainant that she asserted would be responsive to her request. She requested a reply by July 2, 1993.

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[2] Pursuant to §111.39(1), Stats., a charge of discrimination must be filed within 300 days of the alleged discrimination.

20. In response to this letter, Mr. McGrath wrote a letter to Dr. McAweeney dated June 10, 1993 (Respondent's Exhibit 114), which included the following:

> I am writing in response to your notice dated May 5, 1993, concerning the work station and work area accommodations for Ms. Farrar (copy enclosed). It is my understanding that your instructions are to "provide a work station with a lower keyboard because of carpal tunnel and to *provide a non-air conditioned work area because of arthritis.*"
>
> Accommodations were made to provide a work station with a height adjustable keyboard platform and a work area outside the flow of air conditioning. (Actually, the work area is an enclosed office with a window air conditioner that can be shut off.)
>
> Ms. Farrar has now submitted a request to relocate her work area as she requires heat. In an effort to determine whether work place accommodations are necessary and feasible, I need your assistance in determining exactly what work area temperature levels are tolerable for Ms. Farrar's conditions. Specifically: (1) Is a heated work area required? And (2) What is the minimum acceptable temperature level in the work area?
>
> Ms. Farrar has asked that I respond to her specific accommodation request by July 2, 1993. Therefore, I would greatly appreciate your reply to my questions by June 25, 1993.

21. In response to Dr. McAweeney's subsequent inquiry about the work environment available to complainant, Mr. McGrath wrote a letter dated July 22, 1993 (Respondent's Exhibit 116), describing the environment in complainant's then current work station, and the situation with respect to temperature and humidity within the work area generally.

22. In the meantime, Dr. McAweeney wrote a July 21, 1993, letter to Mr. McGrath (Respondent's Exhibit 117) This letter was delivered to Mr. McGrath by complainant, but not until August 4, 1993; she stated to him that she had just received it. The letter included the following:

> Not having received a reply on my inquiry into environmental control systems in Ms. Farrar's area, I have had opportunity to discuss the way out with her. She feels that the area that she is in, if the temperature

> controls were working well would not influence anybody else, but apparently there are limitations as to the flexibility of that system. She feels that if she was in another area that she would be able to control the temperature and humidity. Her arthritis would benefit by a temperature of 79 degrees and a humidity of about 35 percent. If there were such an area where her particular qualifications [sic] wouldn't influence other workers, and I am assured that that is the case, it might be advisable to have her work in that area.

23. Mr. McGrath then communicated with upper level management and the agency personnel manager (Mr. Martinelli) regarding the situation. A meeting ultimately was held on September 1, 1993, with several managers, the personnel manager, complainant, and her union representative. At this meeting, Mr. Martinelli offered to allow complainant to use his personal space heater at her work station, and this was done. Following this meeting, respondent received no further complaints from complainant concerning her work environment at DOJ.

24. Complainant frequently attended therapy sessions in connection with her alcoholism. She requested and received numerous flex-time schedules related to her attendance at these sessions. Respondent required complainant to configure her schedule so that she worked a 40 hour week[3] in accordance with its policies. Respondent did not force complainant to work without compensation.

25. An October 30, 1992, letter to complainant from Mr. McGrath (Respondent's Exhibit 126) included the following:

> I am writing in response to the recent change in your therapy schedule (to Tuesday, between 4:30 p. m. and 7 or 7:30 p. m.); your request for absence from work on December 16, 17, 18, 21 and 22, 1992; and your request to be absent from work on Thursday and Friday, November 5 and 6, 1992. The November absence is to be with your sister during a Family Therapy Program in Minnesota. You do not have any leave time available for these requested absences.
>
> Currently your work schedule is 3 p. m. to Midnight, Monday through Thursday, and from Noon to 4 p. m. on Friday. These work hours have

[3] This requirement did not apply to periods when complainant requested and was granted reduced hours.

> been basically the same since you started employment on January 2, 1991.
>
> A review of your attendance record for the period January 1, 1992 through October 3, 1992, indicates that you have used 70 hours of sick leave, 93 hours of vacation, 24 hours of personal holiday, 8 hours of Saturday holiday, and 416 hours of leave without pay. I am aware of the absences required for personal reasons during March and April 1992.
>
> As you know, you were hired as a Data Entry Operator 1 to perform criminal history record updates within the Identification Section of the Crime Information Bureau. Your position is critical to our operation as the ability to maintain a current workflow severely impacts the entire criminal history program. It is essential to ensure that we can have someone in that position that can fulfill the obligations.
>
> Based on your excessive absence from work during the period from January 1, 1992, through October 3, 1992, I am denying your request for a leave without pay for the above-referenced dates. We need to have you in a full-time capacity to perform your assigned duties.
>
> It is my understanding that the counseling sessions you attend may be available at times that will not conflict with your work schedule. By November 10, 1992, I request that you obtain a report from your counselor explaining why you are unable to attend therapy sessions during non-work hours. If you are unable to accomplish this consistent with your existing work schedule, we will discuss changing that schedule to ensure you are able to work full time.

26. In early August, 1993, complainant expressed an interest in transferring to a vacant "Handgun Hotline" position. Mr. McGrath advised the Division Administrator by a memo dated August 2, 1993 (Respondent's Exhibit 120) that he opposed this, for the following reasons:

> 1. Since May 5, 1993, we have been attempting to determine Ms. Farrar's physical condition and prognosis. This process continues, and it is unclear if the Department will be able to make reasonable work accommodations for her.
>
> 2. Ms. Farrar must attend counseling and therapy sessions during work hours. Accommodations have been made for these needs, how-

> ever, the nature of her current work assignment is more conducive to leaving the work area. Because of the telephone work on the Hotline, one operator cannot provide the required services and no backup personnel are available.
>
> 3. Ms. Farrar's current work production as a DEO-1 is below the standards of her current position as reflected on her most recent Performance Evaluation. An interim three-month review of her performance is scheduled.
>
> 4. Between January 1, 1993 and July 31, 1993, Ms. Farrar has been absent from work for approximately 61 hours of sick leave and 144 hours leave without pay. This time is in addition to using all of her accumulated vacation and personal/Saturday holiday leave. During calendar year 1992 Ms. Farrar was not available for work because of 85 hours of sick leave and 520 hours of leave without pay. Additionally, she ended the year with a negative balance for vacation and Saturday holiday leave. Such absenteeism cannot be covered by existing Hotline staff.

27. The foregoing memo was copied to Mr. Martinelli, who advised management that based on his interpretation of the collective bargaining agreement, complainant should not be denied such a transfer; rather, it should be up to her whether to accept a transfer in light of the potential problems relating to her scheduling and attendance issues in the context of the demands of the Handgun Hotline position.

28. Complainant never submitted a transfer request to the Handgun Hotline position pursuant to the contractual procedure.

29. Complainant made frequent use of paid and unpaid leave. In 1992, complainant used all of her accrued vacation and personal/Saturday holiday leave, and 133 ½ hours of sick leave and 520 hours of leave without pay. As of September 1, 1993, when complainant was issued a "letter of direction" (Respondent's Exhibit 103), complainant had used all of her accrued sick leave, annual leave, personal and Saturday holiday leave time for the year to date, and also had used 67 and ½ hours of worker's compensation leave and 234 hours of leave without pay. The medical need for much of this leave had not been documented to respondent.

30. The letter of direction referred to in the preceding finding included the following paragraph:

> 6. **Direction/Expectations:**
>
> (a) You are expected to return to work on Tuesday, September 7, 1993, at your scheduled starting time of 3:45 p. m.
>
> (b) You will not be absent from work during any month in excess of the average 1.5 days per month of sick leave which you generate from being in a pay status.
>
> (c) You must provide a report to verify any illness. This report must be detailed, contain a specific diagnosis and prognosis, indicate the time you were seen and when you will be able to return to work.
>
> (d) While at work you will work to improve your performance to meet designated standards.
>
> (e) You are hereby notified that any violations of this directive will result in disciplinary actions up to and including termination.

31. Management discussed this letter with complainant and her union representative in a meeting held on September 1, 1993. As part of that discussion, complainant chose to utilize her remaining paid leave in lieu of the corresponding amount of leave without pay so that she would receive a paycheck. Both she and her representative signed the necessary documents to effect this transaction, which zeroed out her paid leave balance.

32. On February 4, 1994, respondent issued a written reprimand to complainant (Respondent's Exhibit 106) in connection with a December 27-29, 1993, absence. The form from the Physician's Plus Immediate Care Center (Complainant's Exhibit H) complainant submitted to respondent with respect to this absence did not have the box labeled "excused absence," checked off, and management had verified with the clinic that if the doctor signing the form had intended to excuse complainant from being at work, this box would have been checked. Complainant had a predisciplinary hearing

prior to the issuance of this letter of reprimand, at which she was represented by a union representative.

33. In early 1994, the funding for the project for which complainant had been hired expired. Therefore, all the employes who had been hired for the project, including complainant, were subject to either termination of their employment or transfer to different positions. Mr. Martinelli advised complainant that the only two options available to her were either to transfer to a first-shift position or to resign. He further informed her that if she chose to resign, respondent would probably not oppose an unemployment compensation claim. After complainant failed to get back to him regarding which option she wished to pursue, Mr. Martinelli assumed she wished to accept a transfer, and he sent her a letter dated February 4, 1994, informing her of her transfer to a first-shift position effective February 20, 1994. Complainant then submitted a letter of resignation, dated February 21, 1994, and effective March 5, 1994 (Respondent's Exhibit 108), in which she stated that "I will not tolerate the abuse I get here on a daily basis. It is too harmful to me and to my sobriety."

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish that there is probable cause to believe that respondent discriminated against her as set forth in those issues for hearing that have not been waived, as set forth above in "NATURE OF THE CASE," except to the extent that respondent has the burden of proof to establish that it would have imposed a hardship on its program to have provided further accommodation than it did.

3. Complainant has not sustained her burden of proof. Respondent did sustain its burden of proof.

4. There is no probable cause to believe that respondent discriminated against complainant as alleged.

OPINION

The pre-hearing conference report dated June 6, 1996, identifies the following issues for hearing[4]:

> 1. Whether there is probable cause to believe that respondent discriminated against complainant in 1993-94 on the basis of handicap with respect to those terms and/or conditions of her employment addressed in the initial determination dated February 17, 1996.
>
> 2. Whether there is probable cause to believe that respondent failed to reasonably accommodate complainant's handicaps in 1993-94 in the manner addressed in the initial determination dated February 17, 1996.
>
> 3. Whether there is probable cause to believe that respondent retaliated against complainant for engaging in fair employment activities in 1993-94 in the manner addressed in the initial determination dated February 17, 1996. [withdrawn in complainant's post-hearing brief]
>
> 4. Whether there is probable cause to believe that respondent retaliated against complainant for whistleblowing in 1994 in the manner set forth in the initial determination dated February 17, 1996. [withdrawn in complainant's post-hearing brief]
>
> 5. Whether there is probable cause to believe that respondent constructively discharged complainant in 1994 in the manner set forth in the initial determination dated February 17, 1996.

Since this statement of issues relies to some extent on the framework of issues utilized in the initial determination, this opinion also will be organized around that framework.

The first issue (discrimination on the basis of handicap with respect to certain terms and conditions of employment) involves the ultimate question of whether respondent took adverse employment actions against complainant because of her handicap. With respect to each term or condition of employment, the initial burden of proceeding is on complainant to show a prima facie case of discrimination. A prima facie case of discrimination in the context of a case of this nature is established by a showing that:

[4] The parties were given an opportunity to object to this statement of issues which had been proposed by the examiner. Neither party filed objections.

1) complainant is a member of a group protected by the WFEA; 2) that she suffered an adverse term or condition of employment; 3) under circumstances which are indicative of discriminatory intent. If the complainant meets this burden, the respondent then has the burden of articulating a legitimate, non-discriminatory reason for the action taken, which the complainant then must show was a pretext for discrimination. *See Puetz Motor Sales Inc. v. LIRC,* 126 Wis. 2d 168, 172-73, 376 N. W. 2d 372 (Ct. App. 1985).

Each of the individual acts of alleged discrimination involved in the first issue have in common the same first element of a prima facie case, in that each involves discrimination on the basis of handicap. Complainant has established that she is a handicapped individual, and thus has satisfied the first element of a prima facie case. At this point, each alleged act of discrimination will be addressed individually.[5]

Respondent deliberately altered complainant's leave slips.

If complainant's leave slips had been altered improperly to complainant's detriment, this would have been an adverse employment action. However, beyond the bare allegation to this effect, there is no evidence that there were any improper changes in her leave slips. Thus complainant has not established a prima facie case as to this allegation.

Respondent improperly deleted vacation credits from complainant's leave account.

The record clearly establishes that certain leave without pay was converted into paid leave, zeroing out complainant's paid leave balance, at complainant's request so that she would receive a paycheck for the period in question. Therefore, there was no adverse employment action and no prima facie case here. Even if complainant had established a prima facie case with respect to this allegation, there is no basis for a conclusion there is probable cause to believe that respondent's rationale for its action was a

[5] These alleged acts of discrimination on the basis of handicap are set forth in the initial determination at pages 9-10.

pretext for an intent to discriminate against complainant because of her handicapped status.

Complainant was required to provide proof of medical appointments in order to claim leave time.

In the "letter of direction" quoted in Finding #29, above, respondent required complainant to "provide a report to verify any illness. This report must be detailed, contain a specific diagnosis and prognosis, indicate the time you were seen and when you will be able to return to work." The imposition of this requirement can be characterized as an adverse employment action because such a requirement was not normally imposed on employes. Assuming for the sake of discussion that complainant established a prima facie case on this issue, respondent articulated a legitimate, nondiscriminatory rationale for its action by asserting that this was done because of complainant's attendance record. Complainant has failed to produce any significant evidence that this asserted rationale was a pretext for handicap discrimination. Complainant argues that respondent failed to produce comparative attendance records of other employes that would have established that her attendance was worse than other employes. However, the agency personnel manager, Mr. Martinelli, testified that complainant's attendance record was the worst he had seen since he began his career in the state personnel service in 1978. This testimony, combined with respondent's records of complainant's attendance (Respondent's Exhibit 101), certainly was enough evidence to satisfy respondent's burden of proceeding on this point, and there is no evidence in the record to rebut it.

Complainant also argues in a post-hearing brief that the amount of medically-related information respondent was directed to provide was contrary to the collective bargaining agreement and to other requirements. However, the only section of the contract that was made part of this record (Complainant's Exhibit Y) does not address this subject. Complainant's references to the FMLA (Family Medical Leave Act; §103.10, Stats.) are unavailing, because complainant has never alleged an FMLA vio-

lation and this subject matter was not part of the issues for hearing. Furthermore, none of complainant's leave was processed under the FMLA.[6]

To the extent that complainant tries to contend that similarly-situated employes were not treated the same, she failed to provide evidence that there were any employes who were "similarly-situated."

Byron Bishop reprimanded complainant for using the telephone to make an emergency dental appointment.

The evidence of record does not support a finding that Mr. Bishop ever reprimanded complainant for using the phone, although he counseled her on proper use of the phone. Thus there was no adverse employment action and no prima facie case.

Dot Franzen refused to investigate complainant's complaints of stolen personal property.

The record does not support a finding that complainant ever complained to Ms. Franzen about stolen personal property. Thus, complainant did not make out a prima facie case on this issue.

In 1992, Patricia Miller divulged confidential information to Dot Franzen from an Employe Assistance Program session Miller conducted between complainant and her leadworker Ricard Urban.

Laying to one side the question of the timeliness of the complaint as to this issue, Ms. Miller's testimony clearly establishes that her attempt to mediate the differences between complainant and Mr. Urban was not an EAP matter, and thus was not subject to the confidentiality requirement of the EAP program. Again, there was no adverse employment action and no prima facie case established on this issue.

Byron Bishop did not permit complainant credit for overtime work.

There is no evidence that Mr. Bishop ever caused complainant not to be paid for overtime worked. There were occasions when he would tell employes to quit work be

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[6] Complainant's leave without pay during the periods in question far exceeded the maximum amount of medical leave available under the FMLA (2 weeks during a 12-month period, §103.10(4)(b), Stats.).

cause they had reached the point where further work would result in the employer's liability for overtime pay. There was no evidence that complainant was singled out in this regard, or other evidence which would create an inference of discriminatory motivation on Mr. Bishop's part. There was a situation where complainant was not allowed to work overtime on a special project, although apparently this was a decision by someone in management other than Mr. Bishop. The reason for this had to do with complainant's lower productivity. Ms. Franzen testified that it was not considered beneficial to use complainant to do this overtime because of the limited amount of output it could be anticipated she would produce. Assuming that complainant established a prima facie case as to this issue, she did not offer any significant evidence that management's rationale for this decision was a pretext for discriminating against her on the basis of handicap. Complainant's performance evaluations establish that her production was at best borderline-acceptable, but below the unit average. Complainant tried to demonstrate that the unit's system for determining error rates was unreliable. However, this is beside the point in a case such as this where the issue is whether respondent deliberately discriminated against complainant on the basis of handicap. There has been no contention that complainant's work was evaluated differently than other employes in the unit. Thus it is irrelevant whether management's system of evaluation could or could not have been better.

Complainant lacked access to respondent's policies and procedures manual.

None of the employes in the agency had their own copies of this manual. There is no evidence that complainant was treated differently than other employes in the agency with regard to being allowed access to management's copies of the manual. While complainant was told she could not make a copy of this manual for her own use on state time and at state expense, there is no evidence that management treated her differently than other employes or that its action was motivated by a discriminatory intent. Therefore, even assuming complainant established a prima facie case as to this issue, there is no evidence that respondent's explanation for its action was a pretext for discriminating against complainant because of her handicapped status.

Respondent altered complainant's worker's compensation claim.

There was no evidence that respondent altered complainant's worker's compensation claim, and no prima facie case was established as to this point.

Respondent refused to allow complainant to sell her vacation time to Sharolyn Marling.

Complainant presented no evidence with respect to this allegation.

Dot Franzen refused to let complainant have union representation at meetings.

The parties disagreed whether the complaint was timely with respect to this allegation. The issue of timeliness was deferred until after the hearing on the merits. There was no evidence that complainant was denied any union representation to which she was entitled during the period of 300 days prior to the filing of her complaint. For that matter, there was no evidence that complainant was ever improperly denied union representation. There was no prima facie case established as to this issue.

Byron Bishop reprimanded complainant for calling an old boss during break.

As was discussed above, Mr. Bishop never reprimanded complainant for using the phone.

Byron Bishop monitored complainant's phone calls.

Mr. Bishop did not monitor complainant's phone calls, although they shared a line at one time and he occasionally picked up his phone when complainant was on the line.

Respondent did not follow appropriate procedures in connection with a disciplinary suspension.

There is no evidence that complainant was ever suspended.

Respondent made complainant come in to work two hours early if she needed to leave for one and one-half hours during the day.

There is no evidence that complainant was required to work more hours than she was paid for, or that respondent took any inappropriate action with respect to her hours.[7]

Respondent deliberately withheld income continuation insurance and dental insurance enrollment forms until the enrollment window had passed.

With respect to the income continuation insurance incident, this occurred in 1991 and thus is outside the scope of the issues for hearing, as well as untimely pursuant to §111.39(1), Stats. In any event, there is no evidence that respondent deliberately did anything to cause complaint to be denied this insurance, no less that respondent had any discriminatory motive with respect to anything that might have happened. With respect to dental insurance, there was no evidence that complainant was ever without dental insurance.

The second major issue in this case involves a question of accommodation, as set forth in the prehearing conference report as follows:

> 2. Whether there is probable cause to believe that respondent failed to reasonably accommodate complainant's handicaps in 1993-94 in the manner addressed in the initial determination dated February 17, 1996.

Complainant alleged three failures to accommodate. The first had to do with a back injury. This occurred in 1991, and any alleged failure to accommodate with regard to failure to provide light duty in connection with this injury[8] is untimely. Complainant also brought in to work a letter from Dr. McAweeney dated February 3, 1993, which includes the statement "She [complainant] is unable to do the work required of her in the file room *at this time*." (emphasis added) Complainant did not present any evidence that she was required to work in the file room against medical advice at any time during the period of 300 days prior to the filing of her complaint on May 2, 1994.

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[7] It may be that complainant is referring to a requirement that her hours of work be sufficient to cover her time off for eating, but this is not clear.

[8] While complainant established that she was handicapped in certain respects—alcoholism, arthritis, carpal tunnel syndrome, and osteoporosis—it is questionable whether her back strain would qualify as a handicapping condition under the WFEA.

Therefore, there is no timely claim with respect to the allegation of failure to provide light duty.

The second alleged failure to accommodate involves her requests for a lower keyboard and a worksite with an appropriate HVAC environment. After considerable discussion of the first accommodation at the hearing, complainant admitted on cross-examination that she did have the use of a lower keyboard. With respect to the second request, after Dr. McAweeney had first advised that complainant should be "out of air conditioning," respondent attempted to find complainant a worksite out of the flow of the central air conditioning, although complainant claimed at the hearing that the wall air conditioning unit in the area in question could not be turned off. In any event, once the focus of the request changed from a location out of the direct flow of air conditioning to one that could be maintained at a certain temperature, respondent provided a space heater which addressed this issue. While it took a few weeks after the receipt of Dr. McAweeney's last letter for respondent to come up with its approach to accommodation, it does not appear that this was an excessive amount of time, particularly since complainant was on leave of absence during most of this period. With respect to the recommendation that complainant would benefit from a humidity of 35%, respondent presented evidence that this was not feasible in the building where complainant performed her data entry work, and this showing was not rebutted by complainant.

The third alleged failure to accommodate involves complainant's requests related to her attendance, which included both requests for leave without pay and for flexibility in her schedule. The record reflects that respondent allowed complainant to take significant amounts of leave without pay. In an October 30, 1992, letter (Respondent's Exhibit 126), Mr. McGrath did deny complainant's request for leave for seven days in November and December 1992, noting that she had been absent from work 611 hours already that year, including 416 hours of leave without pay, and further stating:

> As you know, you were hired as a Data Entry Operator 1 to perform criminal history record updates within the Identification Section of the Crime Information Bureau. Your position is critical to our operation as

> the ability to maintain a current workflow severely impacts the entire criminal history program. Your continued absence has had serious ramifications in your work unit. It is essential to ensure that we can have someone in that position that can fulfill the obligations.

Much of complainant's claim related to handicap accommodation appears to rest on the theory that she was entitled to unlimited time off and/or leave without pay, so long as the leave was related to her therapy. However, this is not the law. The WFEA does not require that an employer has to provide any and all leave requested in connection with an employe's treatment program.

Section 111.34(1)(b), Stats., makes it an act of employment discrimination because of handicap to refuse "to reasonably accommodate an employe's . . . handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program." The questions of what is a reasonable accommodation, and whether a particular accommodation would impose a hardship, involve factual determinations that will vary from case to case. *See McMullen v. LIRC,* 148 Wis. 2d 270, 276-75, 434 N. W. 2d 830 (Ct. App. 1988). There is little precedent on the question of the existence or extent of an employer's obligation to provide an employe with leaves of absence as an accommodation. However, an employer is not obligated to keep an employe on a leave of absence indefinitely when there is no foreseeable date for the employe to return to work. *See Passer v. DOC,* 90-0119-PC-ER, 9/18/92. In the instant case, complainant was not totally unable to work, as in *Passer*, but respondent has demonstrated that the cumulative effect of complainant's extensive absences—611 hours in 1992 through October 3, 1992, including 416 hours of leave without pay—was creating a hardship for respondent's data entry project. In the Commission's opinion, respondent did not violate its duty of accommodation with respect to the denial of leave without pay.

Complainant also contends that the collective bargaining agreement essentially gave her the right to take leave without pay whenever she had a medically-related reason to be absent from work. However, the contract provision which covers this area

appears to leave the decision on medical leave without pay in the discretion of the employer:

> **Section 8: Leaves of Absence Without Pay**
>
> **13/8/1** Except as provided in parts 13/8/3 [leave to serve in union office] and 13/8/4 [parental leave] of this section, employes may be granted leaves without pay at the discretion of the appointing authority . . . A denial shall not be arbitrary and capricious. . . .
>
> **13/8/9** Employes shall be granted a medical leave of absence without pay, up to a maximum of six (6) months, upon verification of a medical doctor that the employe is not able to perform assigned duties. Upon review by the Employer, the leave may be extended. . . . Denials of requests under this section shall not be arbitrary and capricious. (Complainant's Exhibit Y)

Furthermore, by its terms this section of the collective bargaining agreement would not apply to a request for time off for therapy that was unaccompanied by a medical verification that the complainant was not able to perform her assigned duties—e. g., the request to attend the family counseling session in November 1992, which Mr. McGrath denied in his October 30, 1992, letter (Respondent's Exhibit 126).

Complainant also contends she was entitled to leave without pay under the FMLA (Family Medical Leave Act).[9] However, the FMLA provides that "an employe [covered by the law] who has a serious health condition which makes the employe unable to perform his or her employment duties may take medical leave for the period during which he or she is unable to perform those duties," §103.10(4)(a), Stats., and then only for no "more than 2 weeks of medical leave during a 12-month period," §103.10(4)(b). Thus, the FMLA would not apply to requests for leave without pay merely to attend therapy sessions. Furthermore, complainant's leave without pay during this period far exceeded the maximum amount to which she conceivably could have been entitled under the FMLA.

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[9] Since this case does not involve an FMLA claim, and the notice of hearing did not include any issue for hearing involving the FMLA, the only relevance of the FMLA to this case would be to the extent it would be probative to the handicap accommodation claim.

The remaining facet of the accommodation issue concerns the matter of scheduling. The record reflects that complainant's therapy schedule frequently changed, sometimes on a daily basis, and that respondent allowed complainant considerable flexibility in her hours to accommodate her therapy. The October 30, 1992, letter to complainant from Mr. McGrath (Respondent's Exhibit 126) also addressed a change in complainant's therapy schedule:

> I am writing in response to the recent change in your therapy schedule (to Tuesday, between 4:30 p. m. and 7 or 7:30 p. m.) . . . .
>
> It is my understanding that the counseling sessions you attend may be available at times that will not conflict with your work schedule.[10] By November 10, 1992, I request that you obtain a report from your counselor explaining why you are unable to attend therapy sessions during non-work hours. If you are unable to accomplish that consistent with your existing work schedule, we will discuss changing that schedule to ensure you are able to work full time.

The Commission is unable to perceive any possible violation of the WFEA by an employer requiring complainant to utilize non-work hours for counseling sessions, if they were available during non-work hours, rather than attending therapy sessions in the middle of her shift and asking to use flex-time to compensate for the absences.[11]

The last issue for hearing is "whether there is probable cause to believe that respondent constructively discharged complainant in 1994 in the manner set forth in the initial determination dated February 17, 1996." In order to establish a claim of constructive discharge, an employe must show that "the employer knowingly permitted conditions of employment so intolerable that a reasonable person subject to them would resign." *Goss v. Exxon Office Systems,* 747 F. 2d 344, 36 FEP Cases 345, 346 (3d Cir. 1984); *see also Iheukumere v. UW-Madison,* 90-0185-PC-ER, 2/3/94. Essentially, complainant contends that respondent's overall treatment of her amounted to a pattern

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[10] At the time, complainant's basic schedule was 3:00 p. m. to 12:00 a. m. on Tuesdays.
[11] While complainant claims that respondent forced her to change her therapy from the west-side to the east-side groups, the therapist's notes at the time of the change state that the transfer was due to "transportation difficulties." (Complainant's Exhibit K)

of harassment which led to a constructive discharge. This alleged pattern apparently includes the allegations of disparate treatment with respect to terms and conditions of employment, discussed above, as well as other alleged incidents of mistreatment. A number of instances of misconduct alleged by complainant are outside the parameters of the allegations discussed in the initial determination, and thus outside the scope of the aforesaid hearing issue. However, even assuming that all of complainant's allegations were included within the hearing issue, she has not established probable cause to believe she was constructively discharged.

One of the apparently key elements of complainant's constructive discharge claim, which was addressed in the initial determination, is the allegation that she was denied the opportunity to transfer to a handgun hotline vacancy, and that the personnel manager, Mr. Martinelli, told her that she could not transfer because she was handicapped. He denied having said this, and it defies credibility to attribute this remark to Mr. Martinelli, even if he had been intent on discriminating against complainant on the basis of her handicap. Furthermore, complainant lacked credibility as a witness, frequently testifying in an erratic manner. For example, as respondent noted in its post-hearing brief, complainant was "all over the map" in her testimony on the issue of whether she was provided a lowered keyboard, before finally admitting on cross examination that she had. It is possible that Mr. Martinelli explained to complainant that the demands of the handgun hotline position would make it difficult or impossible for management to meet her requests for flexibility in scheduling her hours and to absorb her frequent absences from work. It also is possible that complainant either interpreted such a response as tantamount to a denial, or decided not to pursue the transfer once she realized what the potential problems were. In any event, there is no evidence in the record either that she actually posted under the contract for the handgun hotline position, or that management actually denied her such a transfer.

In her post-hearing brief, complainant relies heavily on respondent's purportedly harassing actions of creating a changing and confusing chain of command over her, including the active involvement in her supervision of higher-level supervisors

such as the bureau director and the assistant division administrator. This contention is outside the parameters of the initial determination, and in any event, the evidence reflects that any changes in the supervisory chain over complainant were for operational reasons and affected other employes in the unit as well, and there is no evidence they were the product of some scheme to harass complainant because of her handicaps. Similarly, when upper-level management became involved with complainant's supervision, it also was for operational reasons. For example, the one time when the assistant division administrator checked on complainant, it was after management had received a report from one of complainant's coworkers that complainant's room smelled of alcohol, and at that particular point there were no other supervisors around to check out the allegation.[12]

Complainant also alleges that Ms. Franzen told her she had to choose between her job and her health. Ms. Franzen denied making this statement. In the Commission's opinion, there is insufficient credible evidence to support a finding for probable cause purposes that Ms. Franzen made this remark.

In summary, there is insufficient evidence in this record to support a conclusion of probable cause to believe that complainant was constructively discharged from her employment with respondent.

CONCLUSIONS OF LAW

1. There is no probable cause to believe that respondent discriminated against complainant in 1993-94 on the basis of handicap with respect to those terms and/or conditions of her employment addressed in the initial determination dated February 17, 1996.

2. There is no probable cause to believe that respondent failed to reasonably accommodate complainant's handicaps in 1993-94 in the manner addressed in the initial determination dated February 17, 1996.

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[12] The assistant division administrator did not detect the odor of alcohol and no action was taken.

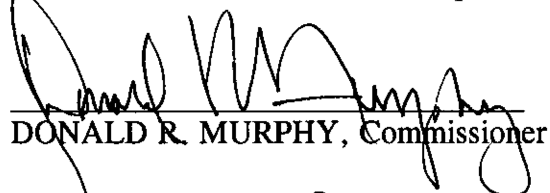
3. There is no probable cause to believe that respondent constructively discharged complainant in the manner set forth in the initial determination dated February 17, 1996.

FINAL ORDER

This complaint is dismissed.

Dated: November 7, 1997 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner

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

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the

Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95