

STATE OF WISCONSIN

PERSONNEL COMMISSION

**SANDRA L. ENDLICH,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
INDUSTRY, LABOR AND HUMAN  
RELATIONS [Secretary, DEPARTMENT  
OF WORKFORCE DEVELOPMENT]<sup>1</sup>,**  
*Respondent.*

**FINAL DECISION  
AND ORDER**

Case No. 95-0079-PC-ER

The Commission, after consulting with the hearing examiner, adopts the proposed decision and order with certain modifications incorporated into the language of this final decision and order, as its final disposition of this case. These modifications were made to more accurately reflect the record.

#### NATURE OF CASE

This matter concerns a charge by complainant, Sandra Lynne Endlich, alleging respondent, Department of Industry, Labor and Human Relations [Department of Workforce Development](DWD), discriminated against her on the basis of her disability and retaliated against her; all in violation of the Wisconsin Fair Employment Act, Subchapter II, Ch. 111, Wis. Stats.

#### FINDINGS OF FACT

1. Complainant has been employed by respondent in its Worker's Compensation Division as an auditor of worker's compensation claims since August 1991.
2. From the time complainant started her employment with respondent, she identified herself as being disabled.

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<sup>1</sup> Pursuant to the 1995 Wisconsin Act 27, effective July 1, 1996, the name of the Department of Industry, Labor and Human Relations changed to the Department of Workforce Development.

3. Complainant was hired into a part-time position with the understanding that the position would increase to full-time. Complainant's probation was initially scheduled to end on February 18, 1992.

4. During the period of time at issue, 1991-1995, complainant had several different supervisors and she engaged each supervisor in discussions and meetings concerning her accommodation needs.

5. Mary Sturm was complainant's supervisor in 1991. Sturm was followed by Linda Holtzbauer, Jean Culbert, Mike Tomsyck and Dana Luft.

6. In 1991, complainant contacted the DWD's affirmative action (AA) office, her union, the Personnel Commission, the Governor's Office and the EEO regarding her right to be accommodated for her disabilities at her work place.

7. Starting in 1992, union steward Craig Myrbo began participating with complainant in her discussions and meetings about accommodation with her supervisors. These discussions and meetings included supervisors at various levels of authority within the Worker's Compensation Division.

8. By letter dated October 16, 1991, complainant requested to work only part-time, rather than being required to assume additional hours of work. This request was granted. Respondent agreed to keep complainant employed on a half-time basis, four hours per day with flexible starting and stopping times<sup>2</sup>.

9. On January 6, 1992, a change in supervisor was made, requiring complainant to make additional work adjustments. These changes affected complainant's work productivity.

10. The new supervisor desired additional time to review complainant's work—which had shown improvement—and recommended extending complainant's probation period. Complainant's probation was extended three months, making her probation end date May 18, 1992.

11. In May 1995 Dana Luft, a female, became complainant's supervisor. In a meeting with complainant, Luft asked complainant about her outside activities—both

personal and work-related. Luft questioned complainant about her association with a law firm. She was concerned about a conflict of interest with complainant's duties as an auditor of worker's compensation claims.

12. By an Inter-Office Memo, dated May 31, 1995, Luft informed complainant of work schedule/work station changes being made "[i]n an effort to reduce backlog and better utilize staff and workstations." These changes included: Beginning June 5, 1995, complainant's workstation would be shared by another staff member from 11:00 a.m. to 4:30 p.m.; complainant's request for a half-hour time window to report to work had been approved, but she would not be able to make up work past 1:00 p.m.; complainant was required to complete bi-weekly leave slips, using sick leave, personal leave, holiday leave, and compensable leave when time could not be made up within the existing pay period. Complainant was required to send an E-mail message to her lead worker upon her arrival and departure from work (previously, complainant's work schedule was very flexible and she could make up time in the afternoons).

13. Complainant complained to her union steward and the AA Office, but she agreed to comply.

14. On June 9, 1995, complainant was at her workstation until 2:30 p.m. She had asked her lead worker for permission to remain there, but there is no record of the lead worker's response. Luft verbally admonished complainant for being there at 2:30 p.m., without her permission. Complainant apologized and told Luft she misunderstood the new work schedule.

15. By letter, dated June 13, 1995, Luft gave complainant a written reprimand for violating DILHR work rule 1, "Insubordination, including disobedience, failure or refusal to follow written or oral instructions of supervisor authority."

16. Complainant advised Luft that she intended to file a grievance, contact the AA Office and inform other appropriate agencies.

17. Luft had verbally warned complainant on May 31, 1995, that she could not make up missed time after 1:00 p.m.

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<sup>2</sup> This sentence was added to the decision to more accurately reflect the record.

18. By memo, dated June 13, 1995, Luft, responding to a May 25, 1995, accommodation request from complainant, replied:

Your disability request is approved with modifications.

1. Your request for an ergonomic chair has been approved and is in the procurement stage.
2. Your request for latitude with hours has been set with a "30 minute" window for variance each day.
3. Your request for walking flexibility can be accommodated. You have your 15 minute break. In addition to that, when you feel the need to stand, walk or stretch, you are free to do that as often as every 30 minutes, (not to exceed 3 minutes).
4. Your request for training on ergonomics has been completed. An ergonomic evaluation of your workstation has been conducted. (Copy attached.) Bob Plakus instructed you on ergonomic correctness.
5. Your request for computer training has been completed with individual instruction on the use of E-mail.

19. Prior to ordering the chair, complainant's workstation was evaluated by an ergonomic evaluation team consisting of respondent's Health & Safety Officer and its Division of Ergonomic Support Representative. The evaluation included a review and analysis with complainant of her work duties, medical concerns and workstation equipment. The ergonomic evaluation report dated May 25, 1995, (Respondent's Exhibit 6) provides the following, in relevant part<sup>3</sup>:

3. Reported Medical Concerns-Sandra indicated that she has had arthritis in the right hip for ~13 yrs dating back to when she was a dancer, for which she is being treated by a physician. She has experienced discomfort/pain in her hip area and her right leg can go numb when she sits too long. She has learned to alternate her sitting with other work so she can periodically get up and exercise her hip and leg during work. Her doctor has recently found that she has a bulge at the base of her neck which is creating some discomfort. This bulge reportedly may be related to disc misalignment or degeneration but a medical diagnosis has not yet been confirmed by her doctor. Sandra also noted that she

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<sup>3</sup> This excerpt from the ergonomic evaluation report was added to the decision to more accurately reflect the record.

was having some difficulty in reading some of the small print documents on her computer screen and occasionally experienced headaches.

4b. Work station utilization-

(1) Chair/Footrest – Review indicated that Sandra’s chair seat was slightly too high which placed her eyes too high for the monitor screen and forced her to constantly bend her neck slightly down to see the full monitor screen. With the higher seat level, she was using an inclined foot rest which tended to raise her knees slightly (especially if she wore high heeled shoes) which would direct unnecessary pressure back through her legs towards her lower back and hips. . . . The chair seat height was immediately readjusted to the proper level which lowered Sandra. It was found with this adjustment that no foot rest was now necessary, that Sandra’s eye level was now correct for the monitor to eliminate the need to bend her neck to view the full screen, that she could easily sit closer to the keyboard and screen which reduced the tendency to bend forward, and that her wrist/carpal tunnel areas were kept straight when using both the mouse and keyboard.

5. Recommendations – The following recommendations are provided for resolution of problems found in this review:

a. Immediately obtain an ergonomic task chair with height adjustable T-arms, a maximum seat depth of 18 ½ inches, an optimum minimum chair seat back of 20”, and high level lumbar support which is designed with a padded back that slightly “wraps” around the lower back/hip area of the chair user. The chair should also be adjustable in seat height and vertical chair back movement. Bob Poi of WC can provide assistance in selecting the correct chair.

b. Once the new chair is received, request assistance from Bob Poi in ensuring proper initial set-up of the chair for the identified ergonomic needs of Sandra.

c. Do not use the lumbar cushion or inclined foot rest and continue to sit closer to the computer workstation at the new chair seat height.

20. Respondent ordered three chairs on July 24, 1995, and one was issued to complainant.

21. Complainant tried the chair, and found it unsatisfactory. The chair had adjustable arms and adjustable seat depth. The chair provided the needed arm flexion,

but lacked sufficient upper body support. Also, when seated, complainant's feet did not touch the floor and she had to use a footrest.

22. Later, complainant visited a supplier and found a suitable chair. Upon complainant's request, respondent ordered this chair for complainant on May 16, 1996. Complainant was satisfied with this chair.

### CONCLUSIONS OF LAW

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

2. Complainant has the burden to show she was discriminated against by respondent on the basis of disability in 1991-1995, or was retaliated against for engaging in fair employment activities during this same period, as alleged.

3. Complainant has failed to sustain her burden of proof on these charges of disability discrimination or retaliation.

### OPINION

The issues in this case are:

1) Whether respondent discriminated against complainant on the basis of handicap with respect to the terms and/or conditions of her employment, as set forth in the initial determination (ID) dated January 16, 1997. (Said ID provides: Complainant identified the following adverse terms and/or conditions of her employment:

- a) During the 1994 work-year, complainant was required to bring in doctor's excuses,
- b) In January 1995, complainant's lead workers went through her desk and papers, and
- c) In a memorandum dated May 31, 1995, complainant was directed to check in and out of work via electronic mail.

2) Whether respondent failed to reasonably accommodate complainant's handicap in 1995 with respect to an ergonomics class and an e-mail class.

- 3) Whether respondent failed to reasonably accommodate complainant's handicap in 1995 with respect to her work schedule and an ergonomic chair.
- 4) Whether respondent retaliated against complainant for engaging in fair employment activities against the respondent in 1995 with respect to the following: In a memorandum dated May 31, 1995, complainant was directed to check in and out of work via electronic mail.
- 5) Whether respondent retaliated against complainant for engaging in fair employment activities in 1995 with respect to the following: the issuance of a written reprimand dated June 13, 1995.
- 6) Whether respondent harassed complainant during 1991-1995 because of her handicap, as set forth in the ID. (Said ID provides: Complainant alleges that respondent engaged in the following harassment behavior because of her handicap:
  - f) In September-October 1991, complainant's supervisor, Shirl Roberts, slammed doors on complainant and shook her cubicle (noted in ¶3),
  - g) In January 1995, complainant's lead workers went through her desk and papers (noted in ¶6),
  - h) On June 25, 1995, complainant's supervisor, Dana Luft, sat down closely next to complainant for about eight minutes and said, "show me what you do, justify your time" (noted in ¶17), and
  - i) In about early July 1995, Luft showed up one night at complainant's non-state place of employment (noted in ¶18).

The Personnel Commission has consistently analyzed Wisconsin Fair Employment Act discrimination cases in the manner articulated in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 965 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 25 FEP Cases 113 (1981). Under *McDonnell Douglas* and *Texas Dept. of Community Affairs*, complainant has the initial burden of proof to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt

to show was a pretext for discrimination. This analysis, described above, was employed in the instant case.

I. Terms and/or conditions of employment

To establish a prima facie case of discrimination as to terms and/or conditions of employment, the evidence must show that 1) complainant is a member of a protected group; 2) complainant suffered an adverse term or condition of employment; and 3) the adverse term or condition existed under circumstances which give rise to an inference of discrimination.

Complainant's case consisted of testimony by the complainant, Craig Myrbo, Ronald Dinerstein and supporting documents. Myrbo testified to participating with complainant in meetings with her supervisors and filing two grievances for complainant. (FOF ¶¶ 7 & 16). Myrbo worked in a different unit than complainant and never supervised her. Outside of the meetings he attended with complainant, most of Myrbo's knowledge stemmed from comments made to him by complainant. Ronald Dinerstein described his job as "moving files around." Dinerstein testified to observing complainant at her workstation in the mornings, but to knowing little about what occurred there in the afternoons. Dinerstein testified that he'd had problems with Supervisor Bothem about religion, but that he did not believe Bothem was anti-Semitic. Dinerstein testified to having no disabilities.

Respondent acknowledged that complainant has various disabilities which place her in a protected group under the WFEA; and complainant testified to item c) listed in issue 1. above. However, little if any evidence was presented regarding items a) and b) in issue 1., and complainant failed to present any evidence that she was treated differently than non-disabled co-workers in similar circumstances. Accordingly, the evidence presented by complainant is insufficient to establish a prima facie case of disability discrimination regarding the alleged adverse terms and conditions of employment.



## II. Reasonable Accommodation

The evidence establishes that respondent was aware that complainant had disabilities and allowed her to have a very flexible work schedule from the very start of her employment. In May 1995, complainant's new supervisor made some work schedule and work station changes because of a need to better utilize the work station and to know when complainant was at work. Documenting evidence (R #5) shows that on July 10, 1995, complainant made a formal accommodation request to return to her former work schedule, which allowed her to make up time after 1:00 p.m. By memorandum, dated August 3, 1995, Lee Shorey, Manager of respondent's Bureau of Claims Management, informed complainant that management would make efforts to adjust her work schedule as needed by her. Complainant never submitted any medical documentation to support her request nor was any requested. The evidence presented establishes that throughout complainant's employment with the respondent, it consistently provided and demonstrated a willingness to provide complainant a manageable work schedule in accommodation of her disability.

Regarding complainant's request for an ergonomic chair in May 1995, the evidence supports a conclusion that respondent made every effort and did reasonably accommodate complainant's disabilities with respect to this request. Complainant testifies her complaint in this regard was that, "No one talked with me about the specifications of the chair or the specifications of my disabilities. I went to affirmative action to ask for a voice in this." However, the record shows that respondent followed the advice of its expert in establishing the specifications for the chair and, as a result, that its actions in this regard were reasonable. Complainant did not cite a delay in providing either chair as a basis for this complaint<sup>4</sup>.

Regarding the issue of whether respondent failed to provide complainant her requested ergonomic class and E-mail class, the evidence supports a conclusion that re-

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<sup>4</sup> The last three sentences in this paragraph were added to the decision to more accurately reflect the record.

spondent satisfied that accommodation. The evidence shows that in May 1995, an ergonomic evaluation of complainant's workstation was conducted and that Health & Safety Officer Plakus instructed complainant on ergonomic correctness. Also, complainant was given individual instruction on the use of E-mail. Complainant presented no evidence indicating that additional instruction in these areas was needed to accommodate and facilitate her ability to perform her job.

Clearly, the evidence present is insufficient to establish that respondent failed to reasonably accommodate complainant as alleged and set out in issues 2 and 3.

### III. WFEA retaliation

Complainant presented evidence which established a prima facie case of retaliation with respect to complainant being directed to check in and out of work via electronic mail (issue 4) and being issued a letter of reprimand (issue 5). The E-mail check in/out system policy was adopted from respondent's personnel department in order to track complainant's work time. No evidence was presented establishing that this was unreasonable considering complainant's flexible schedule and the inability for respondent to otherwise know her actual work hours. Regarding the written reprimand, while this action may be considered questionable, complainant had been given a verbal warning on May 31, 1995. The written reprimand was consistent with respondent's disciplinary policy; and complainant admits that she violated Luft's directive.

The evidence presented on these two circumstances at issue does not support a finding of retaliation.

### IV. Disability Harassment

Complainant presented little, if any, evidence on this question under items f), g), and i) of issue 6., except to generally allude to problems with her supervisors, including Shirl Roberts. Regarding item h), complainant testified that Luft touched her/put her arms around her and she (the complainant) immediately left the area. Luft

never again touched complainant. Complainant explained that she had experienced domestic abuse and since then had become fearful of any physical contact with others.

The evidence in the record does not support a conclusion that complainant was harassed in the workplace. The nature and circumstances of the incident does not meet the requirements of sustained and non-trivial actions.

V. Other

Exhibits offered into the record by complainant that consisted of information outside the parameters of the scope of the Initial Determination investigation and the issues in this matter were determined to be immaterial. The subject exhibits were C-11, 25, 28, 31 and 41. The hearing examiner deferred ruling on these exhibits pending arguments by the parties in post-hearing briefs. Neither party referred to the exhibits in her/his brief and, as a result, it is hereby ruled that they are not a part of the hearing record<sup>5</sup>.

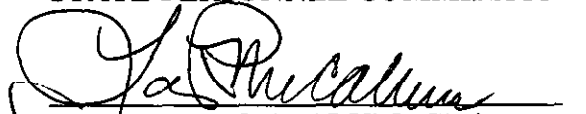
ORDER

This complaint is dismissed.

Dated: October 13, 1998.

DRM:rjb:950079Cdec2.2

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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<sup>5</sup> The last two sentences in this paragraph were added to the decision to more accurately reflect the record.

Parties:

Sandra L Endlich  
707 Hill St  
Madison WI 53705

Linda Stewart  
Secretary, DWD  
PO Box 7946  
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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