STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL A. HAGMANN,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Eau Claire),
Respondent.

Case No. 96-0044-PC-ER

RULING ON REQUEST FOR FEES AND FINAL ORDER

NATURE OF THE CASE

This case involves a complaint of disability discrimination under the WFEA (Wisconsin Fair Employment Act) (Subchapter II, Chapter 111, Stats.). In an interim decision dated February 11, 2000, the Commission adopted, with some modifications, the proposed decision and order. The case is now before the Commission following complainant's application for costs and expenses filed March 10, 2000.

This case has involved a large number of specific allegations of discrimination. The substantive hearing on this case involved a number of issues involving both alleged failures of accommodation and alleged acts of disparate treatment. The decision on the merits in effect identified 23 separate allegations of failure to accommodate and 21 separate allegations of disparate treatment.[1] In addition to these issues, complainant had advanced 20 other specific allegations of discrimination which the Commission had dismissed as untimely filed or for similar reasons in an April 28, 1998, ruling on respondent's motion to dismiss.

In its February 11, 2000, interim decision, the Commission ruled in complainant's favor on 5 of the allegations of failure to accommodate, and ruled against

[1] An example of the issues is "Did respondent treat complainant differently than other employes in the terms and conditions of his employment due to his handicap . . . in regard to . . . on 11/15/95, Duffenbach treated complainant as if he were stupid for asking questions about an invoice on batch #9998." Proposed decision and order, p 2.

complainant on the remaining issues of accommodation and on all allegations of disparate treatment--i. e, the complainant was partially successful.

In *Warren v. DHSS,* 92-0750-PC, 92-0234-PC-ER, 10/2/96, the Commission discussed the principles involved in such cases. The Commission cited *Illinois Welfare Rights Organization v. Miller,* 723 F. 2d 564, 568-69 (7th Cir. 1983), which provided for a three step analysis: 1) an assessment of the results obtained; 2) an evaluation of the extent of the employe's success by comparing the results obtained with the results sought; and 3) the structuring of an award that is reasonable in light of the employe's success.

Here, complainant established 5 of 64, or 7.8%, of his specific alleged acts of discrimination. As a result of the litigation, respondent is being ordered to accommodate complainant's disabilities in 3 respects—using a written format to answer certain of complainant's questions, giving him an opportunity to catch up on his work after returning from vacation, and decreasing its expectations for complainant's output on days that his hand is bothering him. There also were 2 accommodation issues that have been rendered moot by organizational changes—batches of documents awaiting processing are to be stored away from complainant's work area and prioritized by co-workers. Respondent is further being ordered to accommodate complainant's disabilities if those situations should reoccur in the future as a result of future changes in the job. Since complainant did not satisfy his burden of proof as to either the remainder of his accommodation allegations, or any of his multitudinous allegations of disparate treatment, there has been no basis for the entry of a cease and desist or other order as to any of these allegations. Given the limited degree of success complainant obtained, the Commission will award 7.8% of the reasonable fees and costs incurred.

Respondent objected to various parts of the total fees and costs complainant submitted. The first billing was done by Attorney Stewart, who later left the case in connection with his elevation to the bench. Respondent contends that the expenditure of 16.95 hours prior to filing a complaint is excessive in light of the relatively short complaint that was filed. However, this case involved events that occurred over a long

period of time and, as noted by respondent, were documented by extensive notes made by complainant which needed to be analyzed. In light of these factors, the amount of professional time claimed during this period is not excessive and can not be measured solely by the length of the complaint produced. Respondent also objects to another segment of 12.45 hours expended between the time of respondent's answer to the complaint and the issuance of the initial determination, noting that complainant filed only a one page response to the answer. Again, the time involved can not reasonably be assessed on the basis of this one document, and it was not unreasonable. Respondent also objects to .5 hours spent reviewing correspondence from a Glen Stine, whose role in this case is unknown. In the absence of any explanation of this expenditure, this objection will be sustained.

Attorney Stewart billed complainant on the basis of a $90 per hour fee. Complainant contends that this hourly fee should be enhanced to $125 per hour, which is claimed to be the lower end of the prevailing range of fees for attorneys of commensurate experience for representation in employment cases in the Eau Claire/Menomonie area. There is no indication that this fee was established on some unusual basis—e. g., complainant's financial circumstances—and there does not appear to be any other basis for awarding an enhanced fee.

Complainant was next represented by Attorney Steans. Respondent objects to his time spent reviewing materials in the file that presumably had been prepared by Attorney Stewart. Respondent characterizes this as being billed twice for the same work. It is obvious an attorney can not take over a case without becoming familiar with the file, including materials attributable to the previous attorney. This does not equate to billing twice for the same work. Respondent also objects to another .8 hour spent conferring with Glen Stine. Again, in the absence of any indication of who this person is and what role he played in this proceeding, this objection will be sustained.

Respondent also objects to several items of costs, including photocopies in the amount of $71.25. Photocopy charges were denied in *Staples v. SPD,* 95-0189-PC-ER,

11/3/99, where the Commission addressed a number of issues concerning costs in a WFEA proceeding:

> Respondent also objects to complainant's claim for expenses he incurred in litigating this case—travel expenses, lodging, meals, and money he apparently spent on paying witness's wages and meals. The award of attorney's fees and costs is intended to cover direct costs an attorney incurs in the pursuit of a judicial or administrative proceeding, such as filing fees and the costs of service of process, and not complainant's incidental and collateral expenses connected with carrying on an administrative proceeding. *See Halverson v. Milwaukee Co.*, (LIRC, 5/22/87); *State v. Foster,* 100 Wis. 2d 103, 106, 301 Wis. 2d 103 (1981) ("The terms 'allowable costs' or 'taxable costs' have a special meaning in litigation. The right to recover costs is not synonymous with the right to recover the expense of litigation.").[2]
>
> Complainant also has claimed $25 for copies, postage, paper, etc., and $20 for phone calls. Respondent objects to complainant's entitlement for these items, with the exception of the phone calls and postage. Respondent contends that complainant is limited to the types of costs set forth in §§814.04(2) and 814.036, Stats. While these provisions do not explicitly apply to this proceeding, either by their terms or through incorporation by reference, the enumeration of "items of costs" in §814.04(2) indicates the kinds of costs which normally are considered attorney's costs, and should be used for guidance in the absence of a compelling argument to the contrary. Section 814.04(2) specifically mentions the costs of postage and telephone calls. Photocopies, which §814.04(2) does not mention specifically, are not allowable costs. *Kleinke v. Farmers Coop. Supply & Shipping,* 202 Wis. 2d 138, 148, 549 N. W. 2d 714 (1996). Thus the actual compensable costs to be awarded in this case are limited to costs for telephone calls and postage. (footnote in original omitted)

Respondent further objects to $77.00 for facsimile fees. While §814.04(2), Stats., does not specifically include this in the enumeration of allowable costs, it does cover "postage, telegraphing, telephone and express." This terminology is broad

---

[2] For this reason, the Commission can not allow costs for items claimed by complainant as his own expenses associated with his own activities during this proceeding—e. g., the cost of a computer, copier, long distance phone calls, etc.

enough to include facsimiles, which are transmitted over phone lines. It is also broad enough to cover Federal Express charges of $53.75. However, amounts allocated to mileage ($32.40) and a payment to AVA Photo & Video ($56.50)[3], but otherwise unattributed, can not be associated with any allowable item of costs and will be disallowed.

Respondent also objects to $152.11 which the UW-Stout Assistive Technology and Assessment Center billed complainant for the witness fee and mileage for one of its employes who complainant used as an expert witness. Respondent argues that : "Ms. Denno, an employe of the University and state could have been compelled to testify by complainant obtaining an appearance letter from the Commission." Brief in opposition to complainant's application for fees and other expenses, p. 9. This is correct, but it is a point that really involves only the issue of Ms. Denno's pay status while testifying, and not the issue of whether the fees paid UW-Stout should be considered taxable items of costs.

Pursuant to §230.44(4)(b), Stats., a state employe must testify at a hearing when requested by the Commission, and pursuant to §PC 1.13(2), Wis. Adm. Code, is entitled to do so without loss of state salary. However, since UW-Stout is the entity which was paid for Ms. Denno's services, it is reasonable to assume that while Ms. Denno was in state pay status during her testimony, the money paid by complainant was intended to compensate UW-Stout in some measure for the costs of providing her services. In the absence of any indication to the contrary, it also is reasonable to assume that UW-Stout had a legitimate basis for having issued an invoice for Ms. Denno's services. Thus, if the complainant had secured Ms. Denno's appearance through Commission process, UW-Stout presumably would still have been entitled to payment for her services.

Following the issuance of the proposed decision, Attorney Steans withdrew because of a loss of resources in his firm, and was replaced by Attorney Ehlke.

---

[3] The Commission assumes this was a payment for copies of the hearing tapes, but this is not an allowable item of costs, *see Arneson v. UW,* 90-0184-PC-ER, 5/14/92.

Respondent objects to payment of his fees because "there was no degree of success with respect to Attorney Ehlke's participation in this case. There were no modifications to the proposed decision that benefited complainant." Respondent's brief, p. 9. In the Commission's opinion, this proceeding can not be segmented in this way when different attorneys appear sequentially at different points in the process. This is inconsistent with the Commission's holding in *Warren,* which requires focusing on the results the *complainant* ultimately obtained.

In conclusion the allowable fees and costs are as follows:

- Attorney Stewart's fees (at $90 per hour)—$4551.30 minus $45 attributable to a conference with Glenn Stine=$4506.30
- Attorney Steans' fees (at $150 per hour)--$7922 minus $120 attributable to a conference with Glenn Stine=$7802
- Attorney Steans' costs--$356.96 minus $71.25 copying costs, $32.40 unattributed mileage, and $56.50 payment to AVA Photo & Video=$196.71
- Attorney Ehlke's fees (at $200 per hour)--$2400
- Attorney Ehlke's costs--$32.58 minus $32.50 copying costs=$.08

The total amount is $14904.99 which will be reduced by 92.2% which amounts to total allowable costs and fees of $1162.59.

The Commission does not address any possible issue of entitlement to fees under §227.485, Stats. (equal access to justice act), *see Staples v. OPD,*95-0189-PC-ER, 11/3/99:

> [T]his case was brought under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.), [and] that law provides an independent basis for an award of attorney's fees, *see Watkins v. LIRC,* 117 Wis. 2d 753, 345 N. W. 2d 482 (1984); *Ray v. UW,* 84-0073-PC-ER, 5/9/85; which is not preempted by §227.485, Stats., *see Schilling v. UW,* 90-0064-PC-ER, 10/1/92. Since an award of attorney's fees under the WFEA does not involve the same prerequisites as an award under §227.485,[4] the Commission usually does

[4] The primary difference is that Section 227.485(3) provides that fees will not be awarded if the employer was "substantially justified" in taking its position.

not address the issue of entitlement under §227.485 in cases brought under the WFEA. *Id.*

FINAL ORDER

The Commission's interim order entered February 11, 2000, a copy of which is attached hereto along with a copy of the proposed decision and order, is adopted as the final resolution of this matter, except that paragraph 1. D. of the order is amended to read: "Conclusion of Law #4.v.) [in the proposed decision] is amended by the addition of the following sentence: "However, complainant did not comply with the alternative recommendation of answering complainant's questions concerning fees and costs in a written format." Respondent is directed to pay complainant $1162.59 as attorney fees and costs.

Dated: April 25, 2000.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:960044Cdec3.1.doc

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

STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL HAGMANN,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Eau Claire),
Respondent.

Case No. 96-0044-PC-ER

INTERIM DECISION

NATURE OF THE CASE

This case involves a complaint of disability discrimination. It is before the Commission following the hearing examiner's promulgation of a proposed decision and order pursuant to §227.46(2), Stats. The Commission has considered the parties' objections and arguments with regard to the proposed decision and consulted with the examiner, and now issues its decision of the merits.[1]

OPINION

Respondent objects to Finding #1, and asserts that complainant did not demote in 1990 from a Financial Specialist 3 (FS 3) position in facilities management, but rather from an Education Services Assistant 2 position in facilities management. The record supports the assertion that complainant did not demote from an FS 3 position, and this finding will be amended to delete the incorrect reference, and to state that the demotion was from a position in facilities management to an Audit Specialist 1[2] position in accounts payable that was four pay ranges lower than his previous position.

---

[1] This is not the final decision of this case. The Commission will continue jurisdiction to consider the question of attorney' fees and costs.

[2] The record reflects that the proposed decision's reference to this position as an *Account* Specialist 1 was incorrect.

Respondent correctly objects to the proposed decision's references on pages 9 and 10 to a Dr. Shapiro. This reference will be changed to Dr. Finkel.

Respondent objects to Conclusion of Law #4.a), page 18, and the discussion on page 27 concerning respondent's failure to have complied with Dr. Finkel's recommendation that complainant be allowed time to catch up on his work after vacation. The discussion in the proposed decision is as follows:

> Dr. Finkel recommended that complainant be allowed time to catch up on his work after vacation. The record reflects that while complainant was absent, his coworkers performed those functions of his job that, for program reasons, couldn't wait for his return. Once complainant returned from leave, he had all the less than essential work that had stacked up in his absence, plus the regular flow of work. While complainant was dealing with this backlog, this could cause delays in other parts of the payment process, which in turn led to stress. In the absence of a showing by respondent that redistributing the workload so that complainant did not have to deal with such a backlog on his return from vacation, either would have been unreasonable or would have created a hardship for respondent's program, it must be concluded that respondent failed in its duty of accommodation as to this accommodation. Proposed decision, pp.27-28.

Respondent contends that Ms. Duffenbach "told complainant that he could catch up on his work when he returned from leave." Respondent's objections to proposed decision, p. 1. While this statement is somewhat ambiguous, in the Commission's opinion, respondent has not satisfied its burden of proof on Dr. Finkel's recommended accommodation that it "allow [complainant] time to catch up on [his] work after vacation." Complainant's Exhibit C1. Both Ms. Duffenbach's testimony and respondent's arguments raise questions about the contention that Ms. Duffenbach told complainant he could catch up on his work when he returned from leave.

Respondent asserts that Ms. Duffenbach "told complainant that he would have to do a little more work than normal over a period of time to reduce his vacation backlog. This is no different than the expectations that would be expected from any employe returning from leave." Respondent's objections to proposed decision, page 2. Ms. Duffenbach testified as follows about a conversation with complainant:

> [W]e talked about vacation and [I] said that it's normal, you're going to have some backlog when you go on vacation, but that definitely in his absence somebody was doing the absolute essentials, and we all will have a backlog when we go on vacation and it's just a matter of working a little harder to do it.

The specific issue here is not whether respondent was treating complainant differently from other employes, but whether it accommodated the specific request to allow this particular employe who is disabled with Adult Attention Deficit Disorder (ADD) time to catch up on his work after vacations. To tell complainant that he, like all other employes, would have to work harder after he returned from vacation is not providing an accommodation in this regard.

Respondent also argues that the proposed decision rests on an incorrect view of the WFEA because it suggests that respondent had an obligation under §111.34(1)(b), Stats. (which imposes the duty of accommodation), either to have hired additional staff, to have reassigned staff to do some of complainant's work, or to have lowered its legitimate performance expectations. The Commission agrees in a general sense with respondent's statement of the law and rejects any such conclusion that arguably is suggested by the proposed decision. However, in many cases, including this one, there is not a clear distinction between unreasonable expectations that would require the employer to create a new position or to relieve the employe from performing part of his or her duties and more limited changes in the work structure or environment that are not unreasonable.

The Commission discussed this subject in *Harris v. DHSS,* 84-0189-PC-ER, 2/11/88:

> [I]n *Rau v. UW-Milwaukee,* 85-0050-PC-ER, (2/5/87), the Commission held that the employer was not required to permanently assign some of the handicapped individual's work to other staff as an accommodation.
>
> While the employer is not required to create a new job . . . as an accommodation, there is another line of cases which suggests that where the employer normally exercises a degree of flexibility in assigning duties to employes, and in a particular case can do so without hardship, it may be required to do so as an accommodation. Pp. 16-17.

The issue raised by respondent's objection must be addressed in the contexts of both the foregoing principle and the way this case was litigated. Part of respondent's response to the claim that it failed to provide this accommodation (allowing time to catch up on his work upon return from vacation) has been the assertion that other employes did parts of complainant's duties[3] when he was absent, with the result that this relieved enough of the burden complainant had to deal with when he returned from vacation to address the recommended accommodation. In other words, respondent introduced into this case the matter of having other employes do some of complainant's work as an indirect means of addressing the recommended accommodation. However, complainant testified that the amount of his usual work that other employes did when he was on vacation was minimal and was insufficient to relieve the stress he experienced on his return from vacation. Respondent, which has the burden of proof on the issue of accommodation, has not produced contrary evidence that rebuts complainant's assertion. Therefore, respondent's responses to the accommodation Dr. Finkel recommended (allowing complainant time to catch up on his work upon his return from vacation)—pointing out that some of complainant's work was done by others while he was away, and that his supervisor told him that it was normal to have a backlog on his return and that he just needed to work a little harder—were insufficient to satisfy its burden of proof on accommodation. Conceivably, the Commission's conclusion in this regard could be interpreted the way respondent contends—i. e., as a suggestion that respondent had a duty to have hired additional staff, to have reassigned additional staff, to have reassigned staff to do some of complainant's work, or to have lowered its legitimate performance expectations for complainant. However, under the circumstances just discussed, the Commission is not implying that respondent should have hired more staff, etc., by concluding that respondent did not satisfy its burden of proof. The bottom line is simply that respondent neither showed that it provided a

[3] Some of complainant's usual work was done by co-workers, and some of the more complex work by supervisors.

reasonable accommodation in response to Dr. Finkel's recommendation, nor that it was not feasible to have provided an accommodation without the creation of a "hardship."

Respondent also argues that complainant was never disciplined for failing to catch up on his work on time, and that the "record is devoid of any reference to an instance where complainant was denied extra time to complete his work when he returned from leave." Respondent's objections to the proposed decision, p. 2. While the former assertion is factually correct, the latter is not congruent with either the allocation of the burden of proof on the issue of accommodation, or the above-quoted references to respondent's response to Dr. Finkel's recommendation to allow complainant time to catch up on his work after vacation—i. e., to tell complainant that he had to work harder to catch up with his backlog.

> Respondent's final argument on this issue is as follows:
>
> There is no evidence in the record that complainant took any extended leave of absence during the period of covered by the complaint. The only evidence in the record is that complainant took a half-day or a full day here or there. Respondent's objections to the proposed decision, p. 1.

Complainant testified specifically that during this period there were times when he took leave for more than a day at a time. Respondent's only countervailing evidence was the attendance record for the period of two weeks in February 1996, which reflects a total of 4.75 hours of leave during this time, and which does not outweigh complainant's testimony, due to the limited documentation respondent offered.

Respondent objects to Conclusion of Law #4.b), that respondent failed to provide the recommended accommodation of answering complainant's questions in writing.[4] Respondent states that it interpreted Ms. Denno's recommendation as applicable to questions of policy and procedure, and that the proposed conclusion is based on an interpretation of Ms. Denno's advice as applying to *all* questions, and that

---

[4] This recommendation was proposed as an alternative to providing a job coach, which respondent did not do.

it is unreasonable to expect respondent to answer *all* questions in writing. In the Commission's opinion, it is implicit in Ms. Denno's recommendation that it applies only to questions related to policies and procedures. This is based on an application of common sense and by interpreting this recommendation in the context of Ms. Denno's rationale for this accommodation, which included the opinion that it would assist complainant to "build an integrated vision of the policies and procedures in a way that makes sense to him." Finding of Fact #15. The Commission will amend the proposed decision to clarify this. However, it remains that respondent did not satisfy its burden of proving that it provided this accommodation, *see e. g.*, Respondent's Exhibit #107 (Ms. Duffenbach's response to Ms. Denno's recommendations) which does not mention this subject.

Respondent also objects to proposed Conclusion of Law #4.c), which relates to Dr. Finkel's recommendation that respondent decrease its expectations for complainant's output on days that his hand is bothering him. Respondent argues that this is an unreasonable accommodation because it requires that respondent decrease its expectations for complainant's performance, which is inherently unreasonable under the WFEA. At the hearing stage of this matter, respondent's position on this accommodation was that complainant never established that the condition of his hand was a disability, and it never addressed this recommended accommodation per se. See Respondent's post-hearing brief, pp. 7-8.[5] The Commission agrees with respondent that, as a general principle, an employer is not required to lower its normal performance expectations of a disabled employe as an accommodation. As discussed above under a different heading, respondent has the burden of proof on the issue of accommodation (which includes the issue of hardship). Respondent did not make a showing that it lacked the flexibility needed to have addressed Dr. Finkel's recommendation.

---

[5] Both parties had substitutions of counsel between the time the post-hearing briefs were filed and the present.

Respondent also objects to Conclusion of Law #4.d), that respondent did not provide the recommended accommodation of storing batches of work awaiting processing away from complainant's work area. Respondent contends as follows:

> First, if the batches were stored in some other work area there was a concern that complainant would become distracted retrieving the next batches. Second, and perhaps most important, is the fact that moving the batches would not end the potential for complainant being disturbed if another employe needed an invoice out of the batch that complainant was working on. Third, the respondent was in the process of providing for the relocation of batches away from the complainant after obtaining the modular furniture and this, coupled with the switch from pre-audit to post-audit would have solved any problem. (Respondent's objection to proposed decision, pp. 4-5).

The Commission agrees with the proposed conclusion that respondent did not satisfy its burden of proof on this issue. The rationale for Ms. Denno's recommendation was as follows:

> The batches awaiting processing should be stored away from Mr. Hagmann's work area and prioritized by coworkers. A large stack of work to be completed may make some people work faster, but for someone with ADD it is most likely just an additional distraction. Coworkers coming to look through the stacks for particular items add even more stress and distraction. Finding of Fact #15.

If the batches were stored away from complainant, it is possible he might become distracted going to retrieve materials to work on, but he would not have to deal with the potential distraction of other staff coming to his work area to pick up materials for their use. Second, while moving the batches away from complainant would not keep complainant from being disturbed if employes needed something in the stack of materials complainant actually was working on, neither would keeping the other batches in his work area. As to the third argument, the switch from pre-audit to post-audit did effectively address the problem, but this did not occur until February 1997, some 16 months after Ms. Denno's report.

Respondent's final objection is that due to the nature of the pre-audit function, the only prioritization is to arrange the batches in chronological order. However, this

rationale was never advanced during the hearing phase of this proceeding, and the Commission can not conclude that respondent relied on this as a basis for not providing the recommended accommodation.

Ms. Duffenbach's testimony on adverse examination was as follows:

> Q So in the time period between Dr. Finkel's report and the reorganization of the office, the suggestion that batches be stored away from complainant's work area and prioritized by co-workers was not done?
>
> A It could not be accommodated at that particular point.
>
> Q And then after the tall partitions were installed and the office reconfigured, is it your testimony that the batches were prioritized by co-workers?
>
> A They were not prioritized by co-workers, no.
>
> Q That was an accommodation request suggested by Ms. Denno?
>
> A It's in her memo, yes.

Her testimony on direct included the following:

> Q And then, after the Denno report, what if any changes were made in terms of where the batches were stored and whether or not they were put in a priority?
>
> A They were still within his work area, but not directly, immediately behind where he sat and performed his tasks within his workstation.

This record does not provide an adequate basis for respondent's assertion.

The complainant also had objections to the proposed decision. He first objects to Finding #10: "Throughout his employment at accounts payable, complainant has had performance problems, including problems with productivity." Complainant asserts that this finding should be modified to state that respondent has *alleged* there were such performance problems, and any performance problems that existed were due

to complainant's disabilities. So long as respondent had a good faith belief that complainant had these performance problems, whether his actual performance was better or worse than respondent perceived it is of little or no significance to the issues of intentional discrimination. Also, with respect to the accommodation issues, complainant's actual performance did not directly enter into the accommodation recommendations or respondent's response to them, although it is noted that it is consistent with the analysis done by Dr. Finkel and Ms. Denno. The record is consistent with a finding that respondent had a reasonable, good faith belief in the performance problems reflected in complainant's performance evaluations, and Finding #10 will be amended to reflect this.

Complainant also objects to the proposed decision's failure to make a finding that respondent's delay in providing complainant a copy of the Denno report "constituted a derivative failure to reasonably accommodate the complainant's disability." Complainant's objections to proposed decision and order, p.7. One of the issues noticed for hearing in this case is whether respondent harassed complainant due to his handicap by its failure to provide this report until January 25, 1996, and this has been resolved against complainant. Whether this delay was a failure of accommodation was not one of the issues noticed for hearing, and the Commission cannot interject this into the case at this stage of the proceeding.

Finally, complainant objects to the proposed decision's conclusion that respondent did not violate the WFEA when it declined to provide a job coach as Ms. Denno suggested. Respondent based its decision on this point on the rationale that there was nobody available to serve in this capacity because it demanded a significant level of understanding of the UWEC accounting/financial system. Complainant argues that Ms. Denno's recommendation was primarily intended to provide a buffer between complainant and Ms. Duffenbach, and that this function did not require a person with technical expertise as much as a person who had the ability to function as a mediator or facilitator. In the Commission's opinion, the record provides more support to respondent's interpretation than it does to complainant's. Ms. Denno's report

recognizes that complainant's "work requires great attention to detail." Finding of Fact #15. She goes on to state: "At this point, it would be beneficial to both Mr. Hagmann and Ms. Duffenbach to have a neutral party between them. A temporary job coach to patiently help Mr. Hagmann gain confidence in his ability to make appropriate decisions would be ideal." These statements, as well as the extensive record concerning the technical and complex nature of this job, supports the conclusion that to be effective, a temporary job coach would need both conciliation skills and an understanding of the technical aspects of this job.

ORDER

1. The Commission adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, as its substantive decision of this matter, with the following amendments[6]

A. Finding #1 is amended to read:

> Complainant was appointed to an Audit Specialist 1 position (subsequently reallocated to Financial Specialist 3) in the accounts payable unit of the business services operation at UWEC (University of Wisconsin-Eau Claire) in December 1990. This transaction was a voluntary demotion in lieu of discharge from a position in facilities management that was four pay ranges higher than the position in accounts payable. Carol Duffenbach has been complainant's immediate supervisor in accounts payable. At all relevant times, complainant has been in the highest classified position in accounts payable under Ms. Duffenbach, and the only employe in accounts payable with the working title of auditor.[7]

B. Findings #16 and #17 are amended by changing the references to "Dr. Shapiro" to "Dr. Finkel."

C. Conclusion of Law #4.b) is amended to read as follows:

> b) Complainant's questions concerning policies or procedures should be answered in a written format. This is a reasonable

[6] Some minor typographical and other changes are also made in the proposed decision.
[7] The last sentence appears to reflect undisputed facts and is added to give a more complete picture of the situation in this office.

> accommodation which was not provided. Respondent did not establish that providing this accommodation would work a hardship on its program.

D. Conclusion of Law 4.v) is amended by the addition of the following sentence: "However, complainant did not comply with the alternative recommendation of answering complainant's questions concerning policies and procedures in a written format."

E. Finding #10 is amended to read as follows:

> Throughout his employment at accounts payable, respondent has had a reasonable, good faith belief that complainant has had performance problems, including problems with productivity.

2. The Commission retains jurisdiction over this case to address the question of attorney's fees and costs.

3. Complainant's attorney has 30 days from the date of service of this decision to submit a motion for costs in accordance with §PC 5.05, Wis. Adm. Code. Respondent has 20 days thereafter to submit a response, and complainant has 10 days thereafter to submit any reply.

Dated: February 11, 2000.

STATE PERSONNEL COMMISSION

/s/
LAURIE R. McCALLUM, Chairperson

AJT:960044Cdec2.3.doc

/s/
DONALD R. MURPHY, Commissioner

/s/
JUDY M. ROGERS, Commissioner

STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL A. HAGMANN,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Eau Claire),
Respondent.

Case No. 96-0044-PC-ER

PROPOSED DECISION AND ORDER[1]

NATURE OF THE CASE

This case involves a complaint of disability discrimination under the WFEA (Wisconsin Fair Employment Act) (Subchapter II, Chapter 111, Stats.). In a ruling dated April 28, 1998, the Commission established the following hearing issues:

1. Did respondent fail to reasonably accommodate complainant's handicap (writing-hand injury and/or ADHD) with respect to:
   a) The recommendations contained in Dr. Finkel's report of 8/11/95.
   b) The recommendations contained in Sandra Denno's report dated 11/6/95.
   c) On 2/2/96, Duffenbach gave complainant extra work although he had just returned from an absence and had not yet had time to catch up on his backlog. Further, she failed to indicate any due dates for the new work.

2. Did respondent harass complainant due to his handicap (writing-hand and/or ADHD) in regard to the following actions:
   a) On 9/14/95, Duffenbach informed complainant that respondent would not pay the $45 fee for his costs of obtaining copies of materials on ADHD for Duffenbach to share with coworkers.
   b) Respondent's failure to provide the Sandra Denno report until 1/25/96.
   c) On 2/21/96, Duffenbach wrote complainant a letter about his refusal to let her look at a list he was creating at his desk and the

[1] This proposed decision and order, which originally was promulgated on August 20,1999, has been amended to reflect the changes ordered by the Commission in its February 11, 2000, order, and to correct typographical errors in the original document.

letter scheduled a meeting on 2/26/96, to discuss his refusal.

3. Did respondent treat complainant differently than other employees in the terms and conditions of his employment due to his handicap (writing-hand injury and ADHD) in regard to the following actions:

a) On 4/24/95, Duffenbach "verbally attacked" complainant for losing a check and later failed to apologize when she learned he was not responsible.
b) On 5/8/95, Duffenbach required complainant to go to her for help with the computer "Drev" password problems, but allowed coworker Becky to contact the help line number.
c) On 5/10/95, Duffenbach criticized complainant when he asked her help with a cash accountability problem which she felt he could have resolved himself.
d) On 5/12/95, Duffenbach called complainant "stupid", told him to keep his head down and not talk to others, and did not speak with him during "goody-day" break.
e) On an unspecified date, complainant's request to review his personnel file was rejected by an undisclosed person. The union obtained the file on May 31, 1995.
f) On 6/9/95, Duffenbach was critical of complainant during a performance evaluation, but gave him a satisfactory rating.
g) On 6/13/95, complainant requested a vacation day and Duffenbach reacted in a "tirade".
h) On 6/22/95, Duffenbach okayed complainant's vacation but only if coworker Nancy Paulsen was not ill.
i) On 6/22/95, Duffenbach "snubbed" complainant by failing to introduce him to a female representative from the Chancellor's office.
j) On 11/15/95, Duffenbach cautioned complainant on his personal use of the telephone during his lunch and coffee breaks.
k) On 11/15/95, Duffenbach treated complainant as if he were stupid for asking questions about an invoice on batch #9998.
l) On 11/21/95 and on 1/3/96, Duffenbach refused complainant's request to speak with coworkers to instruct them to staple batches differently.
m) On 1/4/96, Duffenbach embarrassed complainant in

front of two coworkers when he asked if he should help answer telephones.

n) On 1/9/96, Duffenbach treated complainant as if he were stupid for asking a question.

o) On 1/31/96, Duffenbach questioned complainant about the prior day's partial absence for a medical emergency.

p) On 2/1/96, complainant returned from an absence and no one did his work while he was gone, although other employes cover for each other.

q) Duffenbach's reaction to complainant's use of ¾ hour sick leave on 2/29/96 (for cutting his tongue), without his providing advance notice.

r) On or about 3/4/96, Duffenbach reminded complainant that he was to provide notice when he was leaving the work area in his role as union representative to provide new employee orientation. She also said he would be allowed a maximum of 30 minutes for the function.

FINDINGS OF FACT

1. Complainant was appointed to an Audit Specialist 1 position (subsequently reallocated to Financial Specialist 3) in the accounts payable unit of the business services operation at UWEC (University of Wisconsin-Eau Claire) in December 1990. This transaction was a voluntary demotion in lieu of discharge from a position in facilities management that was four pay ranges higher than the position in accounts payable. Carol Duffenbach has been complainant's immediate supervisor in accounts payable. At all relevant times, complainant has been in the highest classified position in accounts payable under Ms. Duffenbach, and the only employe in accounts payable with the working title of auditor.[2]

2. The position description for complainant's position has the following position summary:

[2] The last sentence appears to reflect undisputed facts and is added to give a more complete picture of the situation in this office.

> The major responsibility of this position is pre-audit. This position performs comprehensive pre-audits on invoices, payments to individuals for personal services, travel claims contracts, student fee refunds, and miscellaneous activity prepared in Accounts Payable and its satellite units prior to payment and budget update. As part of that process, it also conducts prompt payment reviews. This position as part of its pre-audit responsibilities assures compliance with various Department of Employment Relations travel maximums and Financial Policy and Procedure papers and requires a knowledge of federal, state, and university regulations on tax reporting, State Statutes, State Procurement Policies, System Policy Papers, and the System Procedures Manual.

3. Respondent intended that complainant work under close supervision until he was able to work more independently. However, complainant has continued under close supervision throughout the relevant time period.

4. Complainant has had Attention Deficit Disorder (ADD) at all relevant times.

5. According to complainant's neurologist (Dr. Finkel), complainant's "disability impairs his ability to perform assigned job duties on specific tasks in the following ways. ADD causes distractibility and difficulty in focusing on specific tasks. It is often hard to do sequential items, if there are interruptions," Complainant's Exhibit 1, and the Commission so finds.

6. Complainant's ADD is an impairment which limits the capacity to work and makes achievement unusually difficult.

7. In July 1991 complainant completed a UWEC disability self-identification form in which he stated that he had a non-severe disability consisting of an arthritic condition in his right (writing) hand, and that "[a]t this time, [it] does not limit my capacity to work." Respondent's Exhibit 102. Complainant identified no other disability on this form.

8. According to complainant's neurologist, "[g]iven the fact that there is damaged tendon and steel pins in his right thumb decrease the expectations of his output on those days when his right hand is bothering him." Respondent's Exhibit 105.

9. Complainant's hand condition has been an impairment which limits the capacity to work since August 1995.

10. Throughout his employment at accounts payable, respondent has had a reasonable, good faith belief that complainant has had performance problems, including problems with productivity.

11. Ms. Duffenbach stated as follows in complainant's May 1, 1994—April 30, 1995, performance evaluation, Complainant's Exhibit 8:

> Periodically, there seems to be a need to somewhat "retrain" on activity that has been dealt with before and worked with regularly. It is as if there is difficulty to draw on that knowledge and experience and apply it to different situations in what I perceive to be something that should be "second nature." Perhaps this is attributable to the "learning process." It is hopeful that a medical evaluation can shed some light on this.

12. On August 11, 1995, complainant submitted a "Disability Accommodation Request Form," Respondent's Exhibit 105. Attached to the form was a memo from complainant's neurologist which included the following:

> His Disability is:
>
> Attention Deficit Disorder, Adult Residual Type; Stuttering.
>
> His disability impairs his ability to perform assigned job duties on specific tasks in the following ways. ADD causes distractibility and difficulty in focusing on specific tasks. It is often hard to do sequential items, if there are interruptions.
>
> The reasonable accommodations that I am requesting for him are:
>
> a. That his supervisor read literature on ADHD and be aware of this literature, as well as his rights under the Civil Rights Acts and the Americans with Disabilities Act.
>
> b. That his supervisor be patient with subordinates and especially those with "handicaps." Also, do not single out individuals for public criticism.
>
> c. Allow questioning. The only stupid question is the one that is never asked.

d. Allow time to catch up on work after vacation.

e. To improve focus, allow the use of:

A. Multi-colored highlighters, pencils or pens.

B. "[T]o do lists", agendas, daily work logs as needed.

C. And equal access to the telephones for work related questions, exactly the same as allowed the other individuals with whom he works. If there are perceived problems with his telephone style, work with him constructively to correct and improve his skills. Identify those individuals who have complained about his telephone skills so that he can talk with them and identify specifics.

f. Arrange a more private office to minimize the visual and acoustic interruptions and distractions in the current office scene.

g. Given the fact that there is a damaged tendon and steel pins in his right thumb decrease the expectations of his output on those days when his right hand is bothering him.

h. Implement the Denning [sic] style of management rather than the confrontational style of management.

13. Respondent set up a committee consisting of Ms. Duffenbach, Director of Personnel Services and ADA Coordinator Jerry Witthoft, Assistant Director of Personnel Services Becky Drout, and Director of Business Services Terry Sullivan to address complainant's accommodation request.

14. The committee reached the consensus that the accommodation request was lacking in specifics in some areas and that a number of the specific items in the request had already been provided. The committee contracted with the Center for Rehabilitation Technology, Stout Vocational Rehabilitation Institute, UW-Stout, to have Sandra Denno, a Rehabilitation Engineer, conduct a study and prepare a report.

15. Ms. Denno prepared a report dated November 6, 1995, which included the following:

> Mr. Hagmann has a "U" shaped workstation with the computer in the center. His work area is in the center of the office, just outside the supervisor's door. There is a radio speaker above his desk and the radio is always on. In addition to his other duties, he answers the telephone for the supervisor when she is unavailable. The primary duties have Mr.

Hagmann going back and forth between batch audit forms, the computer, and procedures manuals.

According to Carol Duffenback, Mr. Hagmann's supervisor, this position was created specifically for Mr. Hagmann in 1991. It was set up to have a large amount of structure and routine with close supervision. Ms. Duffenbach feels that she provided a great deal of initial one on one training and provided all of the procedures manuals and other necessary materials but that Mr. Hagmann didn't become independent as she expected. In addition, he would make phone calls to individuals and departments throughout the university to get additional information that she considered unnecessary. He also made many notes and used multi colored pens on the batch sheets which Ms. Duffenback and his coworkers considered unnecessary and distracting to them.

Mr. Hagmann reports that he had difficulty learning as a child. He was pushed to study accounting in college where he found that he could learn if he read the material again and again in a secluded room with a fan running to drown out any noise. In his personal life, he functions by making plans and lists and using a timer so he doesn't miss engagements due to losing track of the time.

On the job, Mr. Hagmann reports that he is easily distracted by phone calls and people walking around and talking in the office. He likes the radio music but it sometimes distracts him. He has had difficulty remembering the codes, policies, and procedures, especially the changes that are made each year that his supervisor seems to have no trouble learning.

Mr. Hagmann feels that he was told to ask Ms. Duffenbach whenever he has a question, but that he is considered incompetent if he does ask. She reports that he asks the same questions again and again and doesn't seem to remember what he has been told in the past. Ms. Duffenbach indicated that Mr. Hagmann is too fussy about codes when sometimes it is not that important. He indicated that she changes her mind frequently about what is and what is not important.

Discussion

Mr. Hagmann has spent his entire life figuring out what he needs to do to learn. He needs a secluded space with white noises (a fan) to drown out any remaining auditory distractions. This should be provided as soon as possible. Someone else in the office should be assigned to answering

the telephone and the telephone on his desk should not even ring unless the call is for him.

This work requires great attention to detail. Mr. Hagmann should be allowed and encouraged to set up any lists, charts, and color coded schemes that help him make certain he has addressed every item necessary. He may be able to do the job without these aids, but it unnecessarily increases his stress level and likely decreases his accuracy and efficiency. If that means double spacing the batch sheets or making copies of them, then that is the accommodation needed. He should work out a color coding scheme using as many colors as he finds appropriate with the stipulation that coworkers will need to scan for only one or two colors and everything printed in those colors will apply to them. For example, all corrections could be in red, so that the coworkers can ignore any blue, green, or other colored writing and only scan for red. In this example, red would not be used for Mr. Hagmann's personal notes. Then, although the page may be cluttered with writing, it will be easy for the coworkers to find any information they need.

The batches awaiting processing should be stored away from Mr. Hagmann's work area and prioritized by coworkers. A large stack of work to be completed may make some people work faster, but for someone with ADD it is most likely just an additional distraction. Coworkers coming to took through the stacks for particular items add even more stress and distraction.

Mr. Hagmann needs to have his workstation modified to decrease the opportunity to be distracted when moving from the paperwork to the monitor screen and back. He should have a tilt table for the paperwork and post-it notes or another technique for keeping his place. The monitor should be positioned with the top of the screen at or just below eye level. There should be a bookstand for holding the manuals used most frequently.

Mr. Hagmann should experiment with using color transparencies over pages of the manuals to see if he can absorb the Information better if the page is colored. Some people find it quite helpful. The same is true of color on the computer monitor screen. Colorful letters and background can help some people stay focused on the words. If Mr. Hagmann could have his notes and manuals stored on a computer with an easy retrieval system for finding the information he needs, he could explore both the use of color and the benefits of a speech synthesizer to speak the words to him as he reads them.

The user unfriendly computer environment is adding to Mr. Hagmann's problems. Hopefully, it will be updated soon for the benefit of everyone that works on the system or does business with UW-Eau Claire. When the system is updated, Mr. Hagmann will require training designed to accommodate his learning style, preferably from someone outside the Accounts Payable Department.

Mr. Hagmann will benefit from the understanding and respect that will come now that his condition has been diagnosed. Just because he has "heard" information does not mean that he has mentally processed the information. He needs to have the answers to all of his questions in writing so he can review them at a less stressful time. He needs to be encouraged to make decisions with the understanding that he will, like anyone else, occasionally be wrong or come to a different decision than someone else would have. He needs to be encouraged not to obsess over unimportant details, but sometimes it may be beneficial for him to get to the bottom of something, even if it is trivial, so he can concentrate more fully on his next task. Mr. Hagmann can reach an adequate level of efficiency, but still not perform the job as fast as another person may be able to do the same work.

At this point, it would be beneficial to both Mr. Hagmann and Ms. Duffenbach to have a neutral party between them. A temporary job coach to patiently help Mr. Hagmann gain confidence in his ability to make appropriate decisions would be ideal. If that is not possible, all of his questions should be clearly answered in writing (or e-mail) and Mr. Hagmann can add this information to his notes. If a similar question arises in the future, Mr. Hagmann and Ms. Duffenbach can refer back to the previously written comments and discuss the similarities and differences between the two situations. That way Mr. Hagmann can build an integrated vision of the policies and procedures in a way that makes sense to him.

Mr. Hagmann's injured thumb causes some problems for him from handwriting and handling files and manuals. Information on a variety of pen gripping devices will be sent. If handwriting begins to cause frequent pain, his work environment will have to be altered so the batch cover sheets come to him as computer files and he makes his alterations on a keyboard.

Summary

> The accommodations discussed will help Mr. Hagmann to work more efficiently and with more independence. They will not help him like the job better. Mr. Hagmann may wish to work with the Human Resources Department to identify other positions within the university that he may be able to transfer to that would make use of his high energy, personable nature, and other considerable talents. The choice should be his, however, because with the appropriate accommodations, he should be able to perform this job adequately.

16. With regard to the specific accommodations recommended by Dr. Finkel and Ms. Denno, respondent instituted the following:

a) Complainant was allowed to use multi-colored highlighters, etc.

b) Complainant was allowed to use "to do lists," etc.

c) Respondent rearranged the office to provide complainant more privacy.

d) Respondent provided complainant a source of "white noise" (fan).

e) Respondent provided modifications to complainant's workstation—bookstand, etc.

f) Respondent provided complainant with pen-gripping and similar devices to address his problems with his hand.

g) Respondent assigned someone other than complainant to answer Ms. Duffenbach's phone.

h) Respondent removed the radio speaker from complainant's work area.

i) Ms. Duffenbach obtained and read and was aware of informational literature on ADD.

j) Complainant was allowed to ask questions.

k) Complainant was allowed access to phones similar to other employes similarly situated.

17. With regard to the specific accommodations recommended by Dr. Finkel and Ms. Denno, respondent did not institute the following:

a) Respondent did not store batches awaiting processing away from complainant's work area and have coworkers prioritize them. Respondent's rearrangement of the office layout resulted in the batches being further away from complainant, but

still in his work area. Nothing was done about having coworkers prioritize the batches. (This requested accommodation was rendered moot in February 1997 when complainant's job was restructured from a pre-audit function to a post-audit function, and complainant no longer had to work with these batches.)

b) Respondent did not provide complainant with a color monitor for a long period of time. It was at first not feasible to provide this accommodation because the entire computer operating system then in use was incompatible with color monitors, and thus this accommodation was infeasible at that time. As noted in Ms. Denno's report, a changeover to a new system was contemplated by respondent at the time she wrote the report (November 6, 1995). When the new system was installed in July 1996, complainant had the use of a color monitor.

c) Respondent did not provide a job coach. Respondent rejected this recommendation because of the opinion that complainant's work required so much specialized knowledge that there was no one on campus who could perform this function. This requested accommodation was infeasible.

d) Respondent did not answer all of complainant's questions in writing or by email.

e) Respondent did not allow complainant time to catch up with his work after vacations, in the sense that much of complainant's work was allowed to accumulate while he was on vacation, and when he returned he had to deal with that accumulation as well as the normal work flow, and was effectively subject to deadline pressure associated with his work.

f) Respondent did not decrease the expectations for complainant's output on days when his hand bothered him.

20. Ms. Drout received Ms. Denno's report on November 6, 1995, and on November 21, 1995, reviewed the report with the members of the committee that had been formed to address complainant's accommodation request. In a memo dated December 19, 1995, Respondent's Exhibit 107, Ms. Duffenbach informed complainant of what would be done in response to the report. Ms. Drout similarly advised Ms. Modl

(complainant's union representative) via a December 20, 1995, email (Respondent's Exhibit 108). Notwithstanding Ms. Modl's request for a copy of the report itself, this was not forthcoming to either her or complainant until January 25, 1996. The reasons for this delay were the Christmas and New Year's holidays, and Ms. Duffenbach concern that complainant might misunderstand certain of Ms. Denno's comments in the report summary, i. e.: "They [accommodations] will not help him like the job better. Mr. Hagmann may wish to work with the Human Resources Department to identify other positions within the university that he may be able to transfer to that would make use of his high energy, personable nature, and other considerable talents." Respondent's Exhibit 106, p.5.

21. On September 12, 1995, complainant and Ms. Duffenbach discussed Dr. Finkel's recommended accommodation that complainant be allowed to use "to do" lists. Complainant said that Dr. Finkel had recommended that complainant take the first 15 minutes of each day for this purpose. On February 7, 1996, at 10:30 a. m., Ms. Duffenbach observed complainant working on a form that appeared to be different from the "to do lists" with which Ms. Duffenbach was familiar. As part of her supervisory role, Ms. Duffenbach asked complainant to show her the form and explain its use to her. Complainant declined to do so, stating that Ms. Drout had advised him that he did not have to do this, and that if Ms. Duffenbach had any problems with that she should speak to Ms. Drout or Ms. Denno.

22. Ms. Duffenbach spoke to Ms. Drout, who advised her that in her opinion Ms. Duffenbach had the right as complainant's supervisor to see the document. Ms. Duffenbach believed that complainant's behavior was insubordinate, and sent him a memo dated February 21, 1996, which stated:

> On February 21, 1996, during work hours, I observed a form on your desk and inquired of you what it was. You indicated that it was a "To Do" list, which I had previously acknowledged you could do as one of our disability accommodations. I asked that you share with me how the form was used and its benefit to you and your position. You refused to do so by responding that if the use of this form were a "problem" you were to consult Carol Modl [complainant's union representative] and

> Becky Drout before speaking with me about the form. Despite my assurances that this should not be perceived as a "problem" and my explanation for making such a request of you, you still refused to do so.
>
> As your supervisor I have the right and responsibility to make inquiries when I observe processes being conducted during work hours that do not appear to be part of an employe's job description or part of a previously established and approved work procedure.
>
> Therefore, you are scheduled to meet with me on Monday, February 26th in my office to discuss your form and its use. Your failure to attend this meeting or to discuss your form and its use may result in disciplinary action.

23. Ms. Duffenbach met with complainant and discussed the form in question. After complainant explained the use of the form, Ms. Duffenbach approved its use. Complainant was never disciplined as a result of this incident.

24. The only time that complainant was absent from work during the week of January 28-February 3, 1996, was for 3.25 hours on Wednesday, January 31, 1996. On Friday, February 2, 1996, Ms. Duffenbach asked complainant to prepare the travel advance report. This is a routine assignment that she gave to complainant each month with a seven to ten day deadline.

25. On September 14, 1995, complainant and Ms. Duffenbach discussed obtaining ADD literature from Dr. Finkel. Complainant indicated that he had arranged an office visit with Dr. Finkel and that complainant did not think he should be responsible for the $45 fee associated with this office visit. Ms. Duffenbach did not think it was necessary for complainant to have an office visit merely to obtain Dr. Finkel's input with respect to obtaining literature about ADD. At complainant's request, Ms. Duffenbach prepared a memo requesting the literature from Dr. Finkel, and complainant delivered it to Dr. Finkel and picked up the literature. There was no cost to complainant involved in this matter.

26. On April 24, 1995, Ms. Duffenbach was looking around the office for a check which was to be picked up at the accounts payable office. She asked complainant if he had the check, and when he said he didn't, she continued looking for it until she

found it with another staff member. She never criticized or disciplined complainant with respect to this incident.

27. On May 8, 1995, complainant was having difficulty logging on to the DREV System (Decentralized Revenue Entry System) (used to enter daily cash receipt from UWEC to the UW-System), because he had forgotten his new password. Ms. Duffenbach told him to rule out any local problems before calling Madison. Ultimately, complainant did call Madison to get the problem straightened out. Complainant was never disciplined with respect to this incident.

28. On May 10, 1995, Ms. Duffenbach worked with complainant when he asked for help with an issue concerning daily cash accountability. This was a routine matter, and Ms. Duffenbach did not say or infer that complainant was somehow stupid for his activities related to this matter.

29. On May 12, 1995, Ms. Duffenbach made the remark, "That was a stupid question," with respect to a phone call she had just completed. She was situated behind complainant when this occurred. Her remark was not directed in any way toward complainant, although he construed the remark in that manner. After this comment she walked past complainant's desk and accidentally bumped into it.

30. The same day, Ms. Duffenbach told complainant to keep his head down and avoid eye contact with others. She said this because she was concerned about complainant's productivity, and she knew he was in an area of relatively high traffic and that he had a tendency to interject himself into conversations involving other people, thus distracting himself from his work.

31. The same day, Ms. Duffenbach did not refuse to talk to complainant during his "goody day" break.

32. On June 13, 1995, complainant came in to Ms. Duffenbach's office about 4:25 p.m., five minutes before the end of the work day, and told her that he was going to take the next day off as vacation. Ms. Duffenbach became irate and swore at complainant, although she did give him the day off. The reasons she got upset were: 1) for a long time she had been trying to impress on complainant that it was important for

him to provide advance notice to her if he wanted to take vacation, so that she could do the necessary planning to make sure that the unit would be properly staffed; 2) earlier that day she had approved another employe's request to take the next day off as vacation; and 3) complainant informed her that he would be taking the day off rather than asking her if it would be alright to do so.

33. On June 22, 1995, Ms. Duffenbach conditionally approved complainant's request to take a day of vacation on June 23, 1995, provided that another employe (Nancy Paulson) who was out on sick leave would be able to work that day. The reason for the condition was that another employe was scheduled to be on vacation on June 23rd, while another employe (Ms. Paulson) had taken sick leave on June 22nd and had advised Ms. Duffenbach that she thought she would be back to work on June 23rd or June 24th. If both of these employes were to be out of the office on June 23rd, there would not be enough coverage to allow complainant to also take the day off. In any event, Ms. Paulson returned to work on June 23rd, and complainant was allowed to take his day of vacation that day.

34. On May 30, 1995, Ms. Drout received complainant's written authorization for Ms. Modl to access his personnel file. This was granted and Ms. Modl obtained access to the file on May 31, 1995.

35. Ms. Duffenbach's evaluation of complainant's performance for the period May 1, 1994, to April 30, 1995, (Respondent's Exhibit 117), was mostly positive but expressed some concern about complainant's performance. This document includes the following remarks by Ms. Duffenbach:

> Periodically, there seems to be a need to "retrain" on activity that has been dealt with before and worked with regularly. It is as if there is difficulty to draw on that knowledge and experience and apply it to different situations in what I perceive to be something that should be "second nature." Perhaps this is attributable to the "learning process." It is hopeful that a medical evaluation can shed some light on this.
>
> There are tendencies, too, to "overkill" in terms of research and documentation and detail. This, too, is routinely addressed, but to Mike's credit, he does attempt to deal with [it]. At the same time, Mike's atten-

> tion to detail is what is needed in the pre-audit area and it does serve him well. What is needed is a happy balance and the ability to determine when and where. . . .
>
> I am heavily involved in this process [coding each line or each requisition] so as to keep the phone inquiries of the department to an absolute minimum. Mike needs to remember that many times, more than one code is acceptable and the degree of "absolute" is not that important in many areas/cases. He has a tendency to break things down too finely. He also needs to learn how to effectively & quickly ask the "right" question to solicit information when making contact with people.

36. There is nothing in this performance evaluation that did not reflect Ms. Duffenbach's good faith opinion regarding complainant's performance. The concerns she expressed were of long standing.

37. On June 22, 1995, complainant perceived that Ms. Duffenbach had snubbed him by failing to have introduced a visitor to the office to him while introducing the visitor to other employes in the office. Complainant thought this visitor was a representative from the chancellor's office. Ms. Duffenbach did not deliberately fail to introduce complainant to any visitor from the chancellor's office on June 22, 1995.

38. On November 15, 1995, Ms. Duffenbach cautioned complainant against excessive use of the office telephone system for personal use. During this period, complainant's desk was in close proximity to her desk. Based on her personal observations of complainant's phone usage, Ms. Duffenbach had a good faith belief that complainant was making excessive use of the phone for personal use. Ms. Duffenbach never disciplined complainant with respect to phone usage.

39. On November 15, 1995, Ms. Duffenbach responded to a question from complainant about an invoice on batch #9998 by telling him she didn't know the answer and he should research the matter and see if he could find out on his own. Ultimately, complainant was allowed to make a phone call to get the information he needed. Ms. Duffenbach's response to his question was made in good faith and was not intended to criticize or otherwise belittle complainant for having asked the question.

40. Due to the condition of his hand, complainant experienced problems with handling batches of receipts that were stapled together in a certain fashion. He discussed this problem with Ms. Duffenbach. Due to the facts that the stapling was done in various units on campus and there was relatively high staff turnover in a number of the positions, it was difficult for Ms. Duffenbach to control how the stapling was done. She told complainant he should simply skip the batches that were problematical, and that she would audit these. However, complainant felt uncomfortable passing work on to Ms. Duffenbach.

41. In response to Ms. Denno's recommendation that complainant not have to answer Ms. Duffenbach's phones in her absence, he was relieved of this duty. However, he was still expected to answer phones when there was no one at the front desk. Complainant told a coworker that he did not have to answer phones at all. Ms. Duffenbach subsequently advised complainant that he was responsible for answering phones when there was no one at the front desk.

42. On January 9, 1996, complainant interpreted Ms. Duffenbach's response to a question as expressing her displeasure with him for asking the question. Ms. Duffenbach was not trying to "put down" complainant with her response.

43. On January 31, 1996, complainant submitted a leave slip to Ms. Duffenbach that referred to a doctor's appointment for his son that day. He did not explain why he submitted the leave request at seemingly the last minute. She questioned him about the word "appointment" and the short notice he had given her, since he had not explained the circumstances. She did give him the time off.

44. On January 31, 1996, during the period complainant was absent, the rest of the Accounts Payable staff had to attend a meeting which lasted from 1:00 p. m. to 4:00 p. m. After the meeting, Ms. Duffenbach and another employe did so much of complainant's work that had to be done that day, the cash accountability report. This was all of complainant's work they had time to do that day.

45. On February 29, 1996, at 3:44 p. m, complainant requested sick leave for a 3:45 p. m. medical appointment for a cut on his tongue which looked like it was

becoming infected, and required prompt medical attention. Ms. Duffenbach reminded complainant of the importance of letting her know about the need to take leave as soon as he became aware of the appointment.

46. On March 4, 1996, complainant began what was a new task for him of providing union orientation for new employes. Prior to this, Ms. Drout sent complainant and another employe (in housing) involved in this activity a memo dated February 28, 1996, Respondent's Exhibit #110, which reminded them of the need to notify their supervisors that they would be away from work during this period, and that they were allowed 30 minutes for this activity. Ms. Duffenbach reiterated this to complainant. These aspects of the union orientation program were consistent with both the union contract and established practice.

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 by a preponderance of the evidence the facts necessary to establish that respondent discriminated against him in the manner set forth in the statement of issues #2 and #3 (harassment and disparate treatment), set forth above on pages 1 to 3.

3. With respect to issues of accommodation, complainant has the burden of proof to establish that he is a person with a disability and that accommodations were requested[3] but not provided. Respondent has the burden of proof with respect to issues concerning whether accommodations which were not provided are *reasonable* accommodations and whether these accommodations would work a *hardship* on respondent's program if they were granted.

4. With respect to issues 1 a) and b) (failure to accommodate with respect

---

[3] In some cases, an employer may have to provide an accommodation in the absence of a request for accommodation. *See Betlach-Odegard v. UW Madison,* 86-0014-PC-ER, 12/17/90. The instant case does not involve this kind of issue.

to Dr. Finkel's and Ms. Denno's recommendations) complainant has established that he is a person with a disability with respect to his ADD condition and the condition of his right hand, and that accommodations were sought via the Finkel and Denno reports. With respect to those requested accommodations, the commission reaches the following conclusions as to whether the parties have sustained their respective burdens of proof:

a) Complainant should be allowed time to catch up on his work after returning from vacation. This is a reasonable accommodation which was not provided. Respondent did not establish that providing this accommodation would work a hardship on its program.

b) Complainant's questions concerning policies and procedures should be answered in a written format. This is a reasonable accommodation which was not provided. Respondent did not establish that providing this accommodation would work a hardship on its program.

c) Respondent should decrease its expectations for complainant's output on days that his hand is bothering him. This is a reasonable accommodation which was not provided. Respondent did not establish that providing this accommodation would work a hardship on its program.

d) Batches of documents awaiting processing should be stored away from complainant's work area. This is a reasonable accommodation which was not provided until complainant's role was changed from pre-audit to post-audit in February 1997. Respondent did not establish that providing this accommodation would work a hardship on its program.

e) Batches of documents awaiting processing should be prioritized by co-workers. This is a reasonable accommodation which was not provided until complainant's role was changed from pre-audit to post-audit in February 1997. Respondent did not establish that providing this accommodation would work a hardship on its program.

f) Ms. Duffenbach should read and become familiar with ADD literature. This is a reasonable accommodation which was provided.

g) Ms. Duffenbach should be patient with complainant. This is a reasonable accommodation to the extent that being patient is interpreted in a way that provides respondent reasonable notice of what is expected of it. The commission reaches no conclusion on the question of whether the recommendation of being patient with complainant provides reasonable notice, because on this record, complainant did not establish that after August 12, 1995, Ms. Duffenbach ever lost her temper with complainant, and has not identified other specific events which he alleges constitute a failure to be patient. Thus it is concluded that respondent did not fail in its duty of accommodation with regard to this recommended accommodation.

h) Complainant should be allowed to ask questions. This is a reasonable accommodation which was provided.

i) Complainant should be allowed the same access to the phones for work related questions. This is a reasonable accommodation to the extent that it is interpreted to mean access equal to other employes similarly situated to complainant. In this sense this accommodation was provided.

j) Complainant should not be singled out for public criticism. This is a reasonable accommodation which was provided.

k) Complainant should be allowed to use highlighters, etc. This is a reasonable accommodation which was provided.

l) Complainant should be allowed to use "to do" lists, etc. This is a reasonable accommodation which was provided.

m) Complainant should be provided with a more private office. This is a reasonable accommodation which was provided.

n) Complainant should be given a source of "white noise." This is a reasonable accommodation which was provided.

o) Someone else should be assigned to answer the telephone. This is a reasonable accommodation which was provided.

p) Complainant should be provided with a modified workstation. This is a reasonable accommodation which was provided.

q) Complainant should be provided pen gripping devices, etc. This is a reasonable accommodation which was provided.

r) To the extent, if any, that removing the radio speaker from complainant's work area was a recommended accommodation, it is a reasonable accommodation which was provided.

s) The recommendation that respondent implement the Deming style of management was not implemented, and is not a reasonable accommodation

t) Complainant should be provided a color monitor. This is a reasonable accommodation which was not provided until July 1996, when respondent made the transition to a new computer system. Because color monitors were not compatible with the old system, it would have worked a hardship for respondent's program to have provided this accommodation before the transition to the new system.

u) Complainant should be treated with understanding and respect. This is not a reasonable accommodation because it fails to provide reasonable notice to respondent of what is expected of its agents in their dealings with complainant.

v) Respondent should provide a temporary job coach. This is a reasonable accommodation but it would have worked a hardship for respondent's program to have provided this accommodation, because there was nobody available to function in this role who had the necessary knowledge to have enabled complainant to "gain confidence in his ability to make appropriate decisions." Finding #15. However, respondent did not comply with the alternative recommendation of answering complainant's questions concerning policies and procedures in a written format.

5. With respect to issue 1.c. (giving complainant extra work on his return on February 2, 1996, from an absence, etc.), complainant did not satisfy his burden of proof to establish that respondent did not provide an accommodation on this occasion.

6. Complainant has not sustained his burden with respect to issues 2, harassment on the basis of disability with regard to the enumerated subjects and 3, treating

complainant differently than other employes in the terms and conditions of his employment due to disability with regard to the enumerated subjects.

OPINION

It should be noted at the outset that the hearing issues involve two conceptually different kinds of disability discrimination, which involve different approaches to liability. The first type is failure to provide certain requested accommodations. Whether the employer failed to provide an accommodation in violation of the WFEA must be determined using an objective standard—i. e., a conclusion of liability does not require that the employer intended to discriminate against the employe, and the employer's good faith belief that its actions were appropriate to the circumstances and the WFEA does not constitute a defense. *See Keller v. UW-Milwaukee,* 90-0140-PC-ER, 3/19/93. The second kind of disability discrimination involved in this case is intentional discrimination on the basis of disability—e. g., Ms. Duffenbach "verbally attacking" complainant with regard to a lost check. With respect to these kinds of issues, respondent is not liable unless its agents acted with discriminatory intent—i. e., the employer's good faith non-discriminatory belief that its actions were appropriate to the circumstances can be relevant.

With respect to both kinds of issues, in order to establish a prima facie case, the complainant must establish: "(1) that he or she is [disabled] within the meaning of the WFEA, and that (2) the employer took one of the enumerated actions on the basis of handicap [disability]." *Target Stores v. LIRC,* 217 Wis. 2d 1, 9-10, 576 N. W. 2d 545 (Ct. App. 1998) (footnotes and citation omitted).

To establish the first element, the complainant must show that he or she has a "physical or mental impairment which makes achievement unusually difficult or limits the capacity to work," §111.32(8)(a), or "[h]as a record of such impairment," §111.32(8)(b), or "[i]s perceived as having such an impairment." §111.32(8)(c).

It is undisputed that complainant's ADD constitutes a disability. However, respondent contends that complainant's hand condition does not constitute a disability.

Respondent bases its contention primarily on two arguments. First, respondent contends that a finding of disability would be inconsistent with the UWEC disability self-identification form complainant filed in 1991. Complainant stated on this form that he had a non-severe disability consisting of an arthritic condition in his right (dominant) hand, and *at this time* [it] does not limit my capacity to work." (emphasis added) Respondent's Exhibit 102. The commission agrees that this exhibit supports respondent's position. However, there is significant and sufficient support in the record through complainant's testimony and comments in Dr. Finkel's report for a finding that at least as of 1995 this condition was indeed limiting complainant's capacity to work.

Respondent's second contention is that Dr. Finkel, as a neurologist, lacked the necessary expertise to identify a disabling condition with respect to complainant's hand. However, it does not follow from the fact that Dr. Finkel's field of medical expertise is neurology that he lacks the necessary expertise to identify the condition reflected by "damaged tendon and steel pins in his right thumb," Complainant's Exhibit 1, which tends to limit complainant's output when the condition "is bothering him." *Id.* It also is undisputed that complainant has had surgery performed on that hand. Given that respondent has not produced any expert testimony or other evidence that complainant's hand should *not* be considered a disability under the WFEA, the commission concludes that there is a preponderance of the evidence that the condition of complainant's right hand constitutes a disability, beginning at least in 1995.

I. ACCOMMODATION

As to the second element of a prima facie case, §111.34(1)(b), Stats., provides that: "Employment discrimination because of disability includes . . . refusing to reasonably accommodate an employe's . . . disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program." In this case, complainant established that he requested accommodations via the Finkel and Denno reports, and that some of them were denied. At this point, the burden of proof shifts to the respondent with respect to the issues of whether the accommodations are reasonable and whether the accommodations would cause a hardship to respondent's

program. *See Target Stores,* 217 Wis. 2d at 9; *Giese v. DNR,* 83-0100-PC-ER, 1/30/85; *Hawkinson v. DOC,* 95-0182-PC-ER, 10/9/98; *cf. American Motors Corp. v. DILHR Department,* 93 Wis.2d 14, 40, 286 N. W. 2d 847 (Ct. App. 1979) ("The burden of proving that no reasonable accommodation could be made is on the employer once the employe has established a prima facie case of [religious] discrimination." (citation omitted)).

Turning to the specific issues for hearing, the questions regarding accommodation are encompassed in the first issue for hearing:

1. Did respondent fail to reasonably accommodate complainant's handicap (writing-hand injury and/or ADHD) with respect to:

a) The recommendations contained in Dr. Finkel's report of 8/11/95.

b) The recommendations contained in Sandra Denno's report dated 11/6/95.

c) On 2/2/96, Duffenbach gave complainant extra work although he had just returned from an absence and had not yet had time to catch up on his backlog. Further, she failed to indicate any due dates for the new work.

With respect to the requested accommodations, respondent implemented a good deal of what Dr. Finkel recommended. Respondent takes the position that some of Dr. Finkel's recommendations are not reasonable accommodations and are outside the scope of his medical expertise—that complainant's supervisor be patient with complainant and not single him out for public criticism, that complainant be allowed exactly the same access to the phones as other employes, that the expectations for complainant's output be lowered on days when his hand was bothering him, and that the "Denning [sic] style of management" be implemented. Respondent argues that these are vague generalizations that are not all specific to the complainant, and that there is no indication that the phone access recommendation has anything to do with complainant's ADD.

As to the recommendation that complainant be treated with patience, although Dr. Finkel worded his recommendation so that it appears to recommend that the supervisor be patient with all subordinates, it does not follow that he was not recommending that respondent treat complainant with patience because of complainant's ADD. It also

does not follow that because Dr. Finkel did not visit the workplace, talk to Ms. Duffenbach, etc., that he lacked a sufficient basis in the record to recommend that complainant be treated with patience because of his ADD. There is nothing inherent in the recommendation that suggests it would be specific only to certain work situations. Respondent produced no testimony or other evidence in contradiction to Dr. Finkel's recommendation, and the conclusion implicit in his recommendation that complainant be treated with patience—that in the context of an ADD condition like complainant's it is important that a supervisor exercise patience in his or her supervision of the individual—does not seem inherently either implausible or outside the scope of a neurologist's expertise.

The question of whether the "patience" recommendation is too vague or generalized to be a reasonable accommodation presents some difficulty. Neither party has cited any precedent addressing such a question. It seems safe to say that for an accommodation to be reasonable, it has to provide reasonable notice to a reasonable employer of what is expected of it. At the same time, it would be inimical to the purpose of the WFEA to reject an accommodation as too vague or generalized merely because it does not provide a laundry list of specific things with which the employer must comply.

The problem of notice with an accommodation of being patient with an employe is that the term has a wide range of meanings. Probably the most commonly understood meaning is one found in the dictionary: "**patience** implies the bearing of suffering, provocation, delay, tediousness, etc., with calmness and self-control." WEBSTER'S NEW WORLD DICTIONARY 1041 (Second College Edition 1972). In this context, one meaning of the recommendation is that the employe's supervisor should not lose his or her temper with the employe. Beyond that, the employer has little guidance with respect to its supervision of the employe. For example, if the employer's usual course of progressive discipline calls for a verbal reprimand followed by a written reprimand, would the requirement of being patient with an employe translate into the necessity of giving the employe two verbal reprimands before moving on to a written reprimand? In any event, in the context of this record, it is not necessary to

resolve the question of whether Dr. Finkel's recommendation to be patient with complainant provided reasonable notice of what was required. Even if it were assumed that it did provide reasonable notice, complainant could not prevail on this issue.

As the complainant's immediate supervisor, Ms. Duffenbach had frequent contact with complainant. The record contains extensive (sometimes contradictory) testimony by Ms. Duffenbach and the complainant about their interaction. However, neither the hearing record nor the post-hearing briefs address the question of which of these interactions allegedly constitute a failure to treat complainant with patience. The only situation which involves a clear issue of Ms. Duffenbach losing her temper occurred on June 13, 1995,[4] which was before Dr. Finkel's report, and thus could not possibly have constituted a failure to provide a recommended accommodation. There were no other incidents involving Ms. Duffenbach actually losing her temper as that term is commonly understood. In the absence of any indication by complainant of what particular matters he allege constitute a failure of accommodation by way of not being patient with complainant, the commission can not rule in complainant's favor on this issue regardless of how it characterizes Dr. Finkel's recommendation.

The commission reaches the same conclusions about Ms. Denno's recommendation that complainant be treated with dignity and respect, for the same reasons. This recommendation is even more vague than the recommendation to be patient. Without complainant having tied this recommendation to any specific incidents, it cannot be concluded on this record that respondent failed to accommodate complainant in this regard.

With respect to the recommendation to allow complainant equal access to the phones for work related questions, given the descriptions in the record of the characteristics associated with ADD, and the considerations discussed above, this also appears

[4] This was when complainant informed Ms. Duffenbach at 4:25 p. m. that he was going to take the next day off.

to be a reasonable accommodation.[5] As to the recommendation to decrease the expectations of complainant's output on days when his hand is bothering him, the above discussion concerning Dr. Finkel's capacity to address this subject has some relevance here. In the absence of any countervailing testimony or evidence, and the fact that Ms. Denno also addressed this as a disability for which accommodation was indicated, there is a sufficient basis to conclude this recommendation is a reasonable accommodation.

The final point of contention in this area concerns Dr. Finkel's recommendation to implement the Deming style of management. This recommendation is far too generalized to provide reasonable notice to respondent of what is expected of it with regard to its supervision of complainant. As discussed above, an accommodation recommendation has to have a sufficient level of specificity to provide an employer reasonable notice of what is expected of it, and this recommendation fails this test.[6]

The next question is whether respondent failed to accommodate complainant as to those recommendations of Dr. Finkel which constitute reasonable accommodations.[7]

Dr. Finkel recommended that respondent be patient with complainant and not single him out for public criticism. The issue of patience has been discussed above. Complainant has not pointed to any specific situations after August 11, 1995, when complainant was singled out for public criticism, and the record does not reflect that this occurred.

With regard to the recommendation to allow questioning, complainant did not specify any situations where complainant was not allowed to ask questions, and none are apparent on the record. There were situations where Ms. Duffenbach wanted him to first try to get a question answered through research, or to get a question answered

---

[5] This is a reasonable accommodation, but only to the extent it is interpreted as inferring that *similarly situated* employes should be treated equally. On this record there were legitimate program reasons why different employes should have different levels of access to the phones.

[6] Even if this were considered a reasonable accommodation, it is possible that it would be considered a hardship for respondent to have to revamp its entire system of management in accounts payable.

[7] Respondent's compliance with a number of the recommendations of both Dr. Finkel and Ms. Denno are not in dispute.

locally before contacting a source outside accounts payable, but that is not incompatible with allowing complainant to ask questions.

Dr. Finkel recommended that complainant be allowed time to catch up on his work after vacation. The record reflects that while complainant was absent, his co-workers performed those functions of his job that, for program reasons, couldn't wait for his return. Once complainant returned from leave, he had all the less than essential work that had stacked up in his absence, plus the regular flow of work. While complainant was dealing with this backlog, this could cause delays in other parts of the payment process, which in turn led to stress. In the absence of a showing by respondent that redistributing the workload so that complainant did not have to deal with such a backlog on his return from vacation, either would have been unreasonable or would have created a hardship for respondent's program, it must be concluded that respondent failed in its duty of accommodation as to this accommodation.

Dr. Finkel's next recommendation was to allow complainant to use "to do lists," colored markers, etc. Respondent did comply with this recommendation. As to the February 7, 1996, incident where Ms. Duffenbach demanded to see complainant's "to do list" (see Findings #21-23) (also discussed below under the heading of harassment), this action by Ms. Duffenbach was a legitimate exercise of management rights and also did not result in any denial of accommodation. Once complainant explained the form to Ms. Duffenbach, she approved its use. Complainant was never told he could not use such forms and was never disciplined for using such forms.

As to the recommendation to allow complainant equal access to the phone, in order to constitute a reasonable accommodation, this recommendation must be interpreted as implying access equal to other employes *similarly situated*. Complainant's phone use was problematical to management to the extent that he relied too much on questions to people outside the unit when the answer was available within the office. This practice had generated complaints to Ms. Duffenbach from people outside accounts payable that complainant had called. There is no accommodation-related reason why management could not tell complainant he had to first try to get his questions an-

swered from resources available in the unit before calling someone outside the unit. The record does not establish that Ms. Duffenbach was aware of other employes who had the same issues regarding their phone usage as complainant.

Respondent did not respond to the recommendation to decrease complainant's output expectations on days when his right hand was bothering him, essentially taking the position that his hand condition did not constitute a disability, and thus complainant had no prima facie case as to this requested accommodation. As discussed above, the commission concludes that complainant's hand condition did constitute a disability, and since respondent did not make any showing that the requested accommodation was unreasonable or would create a hardship for complainant's program, it follows that it failed its duty of accommodation as to this issue.

With respect to Ms. Denno's recommendations, the parties disagree as to whether respondent violated its duty of accommodation as to several of them.

The record shows that although respondent made some effort to address Ms. Denno's recommendation regarding removal of "batches" of accounting materials from complainant's work area and moved the batches a little further away from complainant, the batches were still in complainant's work area, and this accommodation was not fully complied with until complainant's duties were reassigned in February 1997. Respondent also failed to have other employes prioritize the work represented by the batches of documents. Respondent did not demonstrate that to have provided this accommodation would have imposed a hardship on its program.

For a period of time, respondent failed to provide a color monitor as recommended. However, since color monitors were completely incompatible with the entire computer system respondent utilized prior to the transition to the new system after April 1996, to have provided this accommodation was infeasible and would have created a hardship.

Complainant also argues that respondent neither provided a voice synthesizer nor explored its use. However, as Ms. Denno worded this recommendation, it appears she intended that this was something she anticipated complainant would explore:

> If Mr. Hagmann could have his notes and manuals stored on a computer with an easy retrieval system for finding the information he needs, he could explore both the use of color and the benefits of a speech synthesizer to speak the words to him as he reads them. Finding #15

The way the commission views this, Ms. Denno envisioned that complainant would look into this and the matter would be pursued with management if he (complainant) concluded that the voice synthesizer would be beneficial to him. There is no indication that this occurred.

Ms. Denno also suggested either a temporary job coach, or, if that were not possible, providing answers to complainant's questions in writing or email:

> At this point, it would be beneficial to both Mr. Hagmann and Ms. Duffenbach to have a neutral party between them. A temporary job coach to patiently help Mr. Hagmann gain confidence in his ability to make appropriate decisions would be ideal. If that is not possible, all of his questions should be clearly answered in writing (or email) and Mr. Hagmann can add this information to his notes. If a similar question arises in the future, Mr. Hagmann and Ms. Duffenbach can refer back to the previously written comments and discuss the similarities and differences between the two situations. That way Mr. Hagmann can build an integrated vision of the policies and procedures in a way that makes sense to him. *Id.*

Respondent concluded that due to the technical accounting involved in complainant's work, there was no one available who could function as a job coach. Complainant argues that respondent failed to explore whether the use of a job coach without the specialized background still would have been beneficial. Given the wording of Ms. Denno's recommendation (the job coach would "patiently help [complainant] gain confidence in his ability to make appropriate decisions"), it was not unreasonable for respondent to have assumed that an effective job coach would need to be familiar with the accounting process in which complainant was engaged. However, respondent did not comply with the alternative recommendation of answering complainant's questions in a written format, and did not attempt to show that this was an unreasonable accommodation or would have created a hardship for its program

Complainant also contends respondent failed to accommodate him with concerning his problems with respect to some of the batches of documents stapled together in a fashion that caused him difficulty in handling. Changing the way these batches were stapled was not a specific recommendation by either Dr. Finkel or Ms. Denno. Also, Ms. Duffenbach told complainant to skip any problem batches he encountered, and she would take care of them. While complainant testified he did not like creating more work for Ms. Duffenbach, that is not material to the accommodation issue, and it can be concluded that to the extent any accommodation was indicated in this area, Ms. Duffenbach's offer satisfied any duty of accommodation the respondent arguably had.

The last accommodation issue concerns the work respondent gave to complainant on February 2, 1996. The record reflects that during the week in question, complainant had only been absent for 3¼ hours, on January 31, 1996. The work Ms. Duffenbach gave him was a routine report which he did every month, and which had a seven to ten day deadline. This was not a situation where complainant was denied an accommodation with regard to work assignments after returning from vacation.

II. HARASSMENT[8]

Both this issue and the third issue (disparate treatment concerning certain conditions of employment) involve questions of intentional discrimination. The employe must first establish a prima facie case, after which the employer must articulate a legitimate, non-discriminatory reason for its action. Then, for the employe to prevail, he or she must show that respondent's proffered reason was a pretext, and the employer's action was actually motivated by an intent to discriminate. *See Puetz Motor Sales, Inc. v. LIRC,* 126 Wis. 2d 168, 172, 376 N. W. 2d 372 (Ct. App. 1985).

In the most general terms, a prima facie case of discrimination can be established by showing that the complainant is a member of a group protected by the WFEA, that the complainant suffered an adverse action with regard to his or her conditions or privileges of employment, and that there is evidence that the complainant's

---

[8] Each statement of subissue is reiterated and then discussed.

protected status was not treated neutrally in the employer's decision. *See, e. g., Sprenger v. UW-Green Bay,* 85-0089-PC, 12/30/86.

If during the course of the hearing, the parties have effectively addressed all of the issues of a discrimination case as outlined in *Puetz,* the discussion can bypass the prima facie case analysis and move directly to the issue of pretext. *See United States Postal Service Board of Governors v. Aikens,* 460 U. S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478, 31 FEP Cases 609 (1983).

a) On 9/14/95, Duffenbach informed complainant that respondent would not pay the $45 fee for his costs of obtaining copies of materials on ADHD for Duffenbach to share with coworkers.

After complainant told Ms. Duffenbach he had scheduled an office visit with Dr. Finkel to obtain ADD literature and advised her that he did not think he should be responsible for Dr. Finkel's $45 fee, Ms. Duffenbach told complainant that she did not think it was necessary to have an office visit merely to pick up the literature. Complainant then obtained the literature without cost to him. This constitutes neither an adverse employment action nor harassing conduct. To the extent that complainant established a prima facie case as to this incident, he has not established respondent's explanation of its action was a pretext for disability discrimination.

b) Respondent's failure to provide the Sandra Denno report until 1/25/96.

The delay complainant encountered arguably could be considered an adverse employment action. However, there is no liability unless respondent was motivated to withhold the report because of complainant's disabilities. Complainant did not establish that respondent's professed concern about how complainant would take the comments in the report about the possibility of getting a different job was not the real reason for the delay.

c) On 2/21/96, Duffenbach wrote complainant a letter about his refusal to let her look at a list he was creating at his desk and the letter scheduled a meeting on 2/26/96, to discuss his refusal.

As discussed above, Ms. Duffenbach was exercising a legitimate management right by her actions. Complainant did not show that the rationale Ms. Duffenbach gave

for her actions constituted a pretext to discriminate against complainant on the basis of disability.

III. Disparate Treatment[9]

3. Did respondent treat complainant differently than other employees in the terms and conditions of his employment due to his handicap (writing-hand injury and ADHD) in regard to the following actions:

a) On 4/24/95, Duffenbach "verbally attacked" complainant for losing a check and later failed to apologize when she learned he was not responsible.

Ms. Duffenbach never "verbally attacked" complainant for losing a check. Thus there was no adverse employment action[10] and complainant was not treated differently than any other similarly situated employe.

b) On 5/8/95, Duffenbach required complainant to go to her for help with the computer "Drev" password problems, but allowed coworker Becky to contact the help line number.

Ms. Duffenbach told him to rule out any local problems before calling Madison. This was not an adverse action and complainant was not treated differently than any other similarly situated employe.

c) On 5/10/95, Duffenbach criticized complainant when he asked her help with a cash accountability problem which she felt he could have resolved himself.

Ms. Duffenbach worked with complainant on this occasion. There was no adverse action and complainant was not treated differently than any other similarly situated employe.

---

[9] Each statement of issue is reiterated and followed by discussion.

[10] Also, as to this incident and the others which occurred prior to August 12, 1995, when Dr. Finkel's letter advised respondent of complainant's disabilities, Ms. Duffenbach was not aware of complainant's disabilities, and only suspected he had a neurological problem. Prior to that date, there were no circumstances which would give rise to an inference that Ms. Duffenbach acted with a discriminatory intent

d) On 5/12/95, Duffenbach called complainant "stupid", told him to keep his head down and not talk to others, and did not speak with him during "goody-day" break.

Ms. Duffenbach did not call complainant stupid, nor refuse to speak with him during "goody day" break She told complainant to keep his head down and avoid eye contact with others. She had a legitimate reason to have done so, because complainant was easily distracted from his work. There was no adverse action and complainant was not treated differently than any other similarly situated employe. To the extent that complainant might have established a prima facie case, he has not demonstrated that respondent's rationale for its actions was a pretext for disability discrimination.

e) On an unspecified date, complainant's request to review his personnel file was rejected by an undisclosed person. The union obtained the file on May 31, 1995.

The record does not reflect that respondent denied any request by complainant to review his personnel file. There was no adverse action and complainant was not treated differently than any other similarly situated employe.

f) On 6/9/95, Duffenbach was critical of complainant during a performance evaluation, but gave him a satisfactory rating.

Any remarks in the performance evaluation which could be characterized as critical were based on Ms. Duffenbach's good faith opinions regarding complainant's performance. Complainant was not treated differently than any other similarly situated employe.

g) On 6/13/95, complainant requested a vacation day and Duffenbach reacted in a "tirade."

Ms. Duffenbach lost her temper on this occasion and swore and yelled at complainant. She was reacting to complainant telling her five minutes before the end of the workday that he was taking the next day off, in the context of the factors that Ms. Duffenbach had made repeated efforts to impress on complainant the need to plan vacation

in advance, and she had already granted one employe the next day off as vacation. Complainant was not treated differently than any other similarly situated employe. Ms. Duffenbach did not react this way because complainant was a person with a disability.

h) On 6/22/95, Duffenbach okayed complainant's vacation but only if co-worker Nancy Paulsen was not ill.

Complainant was able to take his vacation. The condition was placed on his use of leave because of other employe's leave. There was no adverse action and no differential treatment compared to similarly situated other employes.

i) On 6/22/95, Duffenbach "snubbed" complainant by failing to introduce him to a female representative from the Chancellor's office.

Ms. Duffenbach did not deliberately snub complainant. There was no representative from the Chancellor's office in accounts payable that day. There was no adverse action and complainant was not treated differently than any other similarly situated employe.

j) On 11/15/95, Duffenbach cautioned complainant on his personal use of the telephone during his lunch and coffee breaks.

Ms. Duffenbach had a good faith belief that there were legitimate management reasons for this action. Complainant was not treated differently than any other employe similarly situated.

k) On 11/15/95, Duffenbach treated complainant as if he were stupid for asking questions about an invoice on batch #9998.

Ms. Duffenbach told complainant she didn't know the answer to his question and that he should research the question and try to find the answer on his own. There was no adverse action and complainant was not treated differently than any other similarly situated employe.

l) On 11/21/95 and on 1/3/96, Duffenbach refused complainant's request to speak with coworkers to instruct them to staple batches differently.

Ms. Duffenbach's opinion was that it would not be efficacious to speak with other employes because the problem was being caused by people at different locations on campus, and there was considerable staff turnover. She told complainant he should skip any batches that would be problematical to him and she would do these. Complainant felt uncomfortable giving Ms. Duffenbach extra work, but there was no adverse action and complainant was not treated differently than any other similarly situated employe.

m) On 1/4/96, Duffenbach embarrassed complainant in front of two coworkers when he asked if he should help answer telephones.

Ms. Duffenbach merely told complainant he had to answer phones if there were no employe at the front desk. She did not intend to embarrass complainant. There was no adverse action and complainant was not treated differently than any other similarly situated employe.

n) On 1/9/96, Duffenbach treated complainant as if he were stupid for asking a question.

Complainant may have felt Ms. Duffenbach was treating him as if he were stupid, but she was not trying to do so. There was no adverse action and complainant was not treated differently than any other similarly situated employe.

o) On 1/31/96, Duffenbach questioned complainant about the prior day's partial absence for a medical emergency.

Ms. Duffenbach questioned him because he had not explained why he took leave with almost no notice. There was no adverse action taken with regard to complainant and he was not treated differently than any other similarly situated employe.

p) On 2/1/96, complainant returned from an absence and no one did his work while he was gone, although other employes cover for each other.

Due to unusual activities that day, staff time was limited and they did not have time to do more of complainant's work than the minimum that had to be done that day. Complainant was not treated differently than any other employe similarly situated.

q) Duffenbach's reaction to complainant's use of ¾ hour sick leave on 2/29/96 (for cutting his tongue), without his providing advance notice.

Ms. Duffenbach reminded complainant of the importance of letting her know about the need to take leave as soon as he became aware of the appointment. There was no adverse employment action and complainant was not treated differently than any other employe similarly situated.

r) On or about 3/4/96, Duffenbach reminded complainant that he was to provide notice when he was leaving the work area in his role as union representative to provide new employee orientation. She also said he would be allowed a maximum of 30 minutes for the function.

Ms. Duffenbach's reminders were consistent with the union contract and established practice. There was no adverse action and complainant was not treated differently than any other similarly situated employe.

Although this disposes of the formal issues, the commission adds the following by way of dictum.

The United States EEOC (Equal Employment Opportunities Commission) has promulgated interpretive guidelines to the Americans With Disabilities Act which include the following with respect to the accommodation process: "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." 29 CFR Part 1630, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, §1630.09. While this commission does not enforce the ADA, it has endorsed using the EEOC guidelines for guidance under the WFEA where those guidelines involve ADA provisions which are conceptually sufficiently analogous to the WFEA, *see Rogalski v. DHSS,* 93-0125-PC-ER, 6/22/95. In the Commission's opin-

ion, the use of a flexible interactive process involving both parties to determine reasonable accommodations is to be recommended.

In the instant case it appears the respondent made a good faith attempt to accommodate complainant's disabilities. However, there was little effort to involve complainant in the process. This is illustrated by the fact that respondent advised complainant of its response to his accommodation request and Ms. Denno's recommendations without having provided her five page, single-spaced report to complainant, and he did not receive a copy of the report or become aware of its content for over a month after respondent began to implement its response to the report and the accommodations request. The commission wonders whether some of the controversy that arose in connection with the respondent's accommodation effort could have been avoided if the parties had met and discussed their views on the report and Dr. Finkel's recommendations before respondent proceeded. Also, again with the benefit of hindsight, it appears that consultation with the source of the expert opinion might have been helpful. It is recommended that the parties consider these points with regard to any further efforts to provide accommodations.

ORDER

This matter is remanded to respondent with directions to accommodate complainant by answering his questions to his immediate supervisor concerning policies or procedures in a written format, giving complainant an opportunity to catch up on his work after returning from vacation, and decreasing its expectations for complainant's output on days that his hand is bothering him. Respondent is further directed to accommodate complainant, as to accommodations now moot, if future circumstances ever are such as to call for these accommodations, to wit: that batches of documents awaiting processing be stored away from complainant's work area and be prioritized by coworkers. Complainant's remaining claims are dismissed.

Dated: _____, 2000.

STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

AJT
960044Cdec1.5.doc

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

Parties:

Michael A. Hagmann
3209 Douglas Lane
Eau Claire, WI 54703

Katharine Lyall
President, UW System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706