

**PATRICIA D. PRISCHMAN,**  
*Complainant,*

v.

**Chancellor, UNIVERSITY OF  
WISCONSIN-MILWAUKEE,**  
*Respondent.*

ORDER

Case No. 98-0108-PC-ER

This case is before the Commission following the promulgation of a proposed decision and order by the hearing examiner pursuant to §227.46(2), Wis. Stats. The complainant, Ms. Prischman, has filed objections to the proposed decision, which the Commission now addresses.

A large part of complainant's objections concern a tape recording that was the bone of considerable contention during the hearing. Complainant objects to its consideration, but the fact is that this tape recording was *not* received in evidence and has *not* been considered by either the hearing examiner or the Commission. Nor has the short part of the tape that was played during the hearing been considered. As explained in the proposed decision at pp. 13-14, the short section of the tape was allowed to be played to see whether complainant could authenticate it. When she denied that the tape was authentic, it was ruled that:

Since there is no other even putative foundation for the tape, and complainant's testimony that the tape was falsified is totally un rebutted, there is no foundation for the part of the tape that was played, and the Commission does not accord any weight to the statements on the tape, for impeachment or for other purposes. However, there is sufficient evidence in the aforesaid email (R-10), complainant's testimony, and Mayrl's testimony to support the finding that, contrary to Mayrl's directive, complainant discussed with Henderson the reasons for his nonrenewal. (Proposed decision, p. 14)

Complainant also objects to what she considers misleading characterizations of her relationship with Valarie Rand, arguing that the proposed decision doesn't look at the whole picture. The hearing examiner and the Commission considered all the exhibits that were received

into the record, and reviewed the entire transcript of the hearing. It is clear from this record that the complainant failed to follow Mayrl's directives regarding her supervisory relationship with Rand. Furthermore, as the proposed decision states:

[C]omplainant failed to comply with Mayrl's directives to resolve the dispute between her and Rand, and to respond to Rand's request for specific written job expectations. It appears that complainant and Rand were involved in a power struggle. It is not the Commission's role to try to make judgments about which of these individuals was right or wrong in that regard. Rather, the Commission must evaluate the record for evidence that respondent was motivated by complainant's disability. Complainant not only failed to comply with Mayrl's directives to provide a written response to Rand's explicit request for an enunciation of performance expectations, and to resolve the dispute between complainant and Rand, but also she responded to Rand with acerbic emails (Respondent's Exhibits R-14, R-15) that were almost guaranteed to make the dispute worse. (Proposed decision, p. 18.

Complainant contends that as to staff turnover under her supervision, she was not the appointing authority, and that someone further up the management chain had to sign off on the personnel transactions in question. However, it was logical for upper management to look to her to bear the brunt of the responsibility as the immediate supervisor.

Complainant also argues with regard to a number of areas that the proposed decision takes things out of context and does not consider the whole picture. As stated above, both the hearing examiner and the Commission have reviewed the entire record of this case, both the exhibits and the transcript of the two day hearing. Obviously the decision can not quote the entire transcript, but it refers to particular parts of the record to illustrate or emphasize what the hearing examiner and the Commission consider to be more significant.

Finally, complainant argues that the proposed decision erroneously concluded that "my attorney did not make a case for my being obese." Complainant's objections, p. 3. This is not what the proposed decision concludes. Rather, it points out that "there was some peripheral mention of complainant's morbid obesity as a possible separate basis for a disability under the WFEA, neither party has directly addressed this point, and the Commission makes no determination on that question." (Proposed decision, p. 9, n) That is, the proposed decision acknowledges that complainant was morbidly obese, and that this compounded her problems

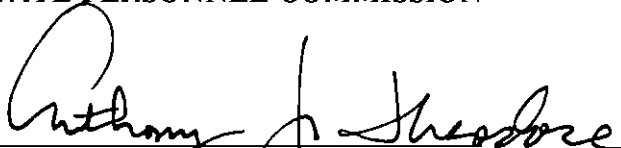
from osteoarthritis of her knees, but complainant's attorney did not make the argument that the obesity was a separate disability in addition to her osteoarthritis. In any event, the Commission's decision of this case would not be any different if complainant's obesity were considered a separate disability.

ORDER

The Commission adopts as its final disposition of this case the attached proposed decision and order. The Commission having concluded that there is no probable cause to believe respondent discriminated against complainant as she alleged, this case is dismissed.

Dated: May 1, 2002.

STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

  
KELLI THOMPSON, Commissioner

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NOTICE

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

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

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

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

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

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

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

2/3/95

STATE OF WISCONSIN

PERSONNEL COMMISSION

**PATRICIA D. PRISCHMAN,**  
*Complainant,*

v.

**Chancellor, UNIVERSITY OF  
WISCONSIN-MILWAUKEE,**  
*Respondent.*

PROPOSED DECISION  
AND ORDER

Case No. 98-0108-PC-ER

#### NATURE OF THE CASE

This case involves a complaint of disability discrimination under the WFEA (Wisconsin Fair Employment Act, Subch. II, Ch. 111, Stats.), involving the following issue for hearing:

Whether there is probable cause to believe that respondent discriminated against complainant based on disability with respect to complainant's demotion on August 12, 1997, from the position of Director of Residence Life to the position of Senior Student Services Program Manager. Conference Report dated July 9, 2001, Ruling on Statement of the Hearing Issue, entered August 28, 2000.

A federal claim related to the subject matter of this case originally was filed with the EEOC (United States Equal Employment Opportunities Commission). On August 19, 1998, the EEOC dismissed that complaint because it determined it was unable to conclude, based on the information before it, that there was a violation of federal law.<sup>1</sup> Pursuant to its usual practice, on April 28, 2000, the Wisconsin Personnel Commission (WPC) adopted the EEOC determination to conclude, with regard to the complainant's charge that had been cross-filed with the WPC, that there was no probable cause to believe discrimination had occurred, and complainant appealed this determination pursuant to §PC 2.07(3), Wis. Adm. Code, on May 26, 2000. On May 9, 2001, the WPC issued a ruling denying respondent's motion to dismiss for untimely filing.

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<sup>1</sup> The EEOC did not advise the WPC of its action until April 10, 2000.

## FINDINGS OF FACT

1. Complainant has suffered from severe osteoarthritis of the knees, greatly compounded by morbid obesity since at least April 1996. This condition has required the use of chronic narcotic pain medications, and has severely limited her ability to walk. This condition has made achievement unusually difficult and limited her capacity to work.

2. Complainant has been employed at UWM since 1975. Since 1993, until her re-assignment to the academic staff position of Senior Student Services Program Manager effective August 12, 1997, she was employed on a series of one year, limited appointments pursuant to §UWS 15, Wis. Adm. Code, as Director of Residence Life. Pursuant to §UWS 15.01, these appointments are "at the pleasure of the authorized official who made the appointment," who was William Mayrl, Assistant Chancellor of Student Affairs. For approximately six years prior to 1993, complainant served a series of limited appointments as Acting Associate Director of Residence Life.

3. While serving as Director of Residence Life, complainant's performance evaluations have reflected at least average performance. Some aspects of these performance evaluations include criticisms of complainant's performance. Her evaluation for calendar year 1996 (R-24) refers to her performance as "uneven" and notes a degree of failure to provide "a clear communication of the mission, a sense of when to cut off input and the ability to focus on and select solutions which serve the mission," and also that "some of the policies and practices that are created and engaged in by her staff are counterproductive." Her evaluation for calendar year 1995 (R-25) characterizes complainant's overall performance as "satisfactory," and states that "she has often been too passive allowing less than satisfactory performance to occur without intervention . It is important that Pat take the word 'Director' literally and apply it to herself in her role."

4. In her position as Director of Residence Life, complainant was supervised by Elmer Hamann, who was supervised by Mayrl, the Assistant Chancellor for Student Affairs, who was the appointing authority for positions within the Department of Student Affairs, including complainant's.

5. Complainant was the immediate supervisor of Valarie Rand, the Assistant Director of Residence Life. The relationship between complainant and Rand was disputatious. On or about June 19, 1997, Mayrl instructed complainant to take steps to improve this relationship, and to respond to the following request from Rand contained in a June 5, 1997, memo to complainant (R-4):

**I am requesting your written goals and expectations for me in my position as the Assistant Director for Residential Life in order to facilitate a successful academic year for my staff and for me.**

The specific areas in which I need your written expectations are stated below. Essentially, I am seeking clarification that would answer the question, "What are you expecting of me as I . . . :

1. Supervise the Residential Life staff
2. Manage and Develop the residential life programs
3. Work as a member of your director and staff team
4. Seek to effectively communicate with you and to foster communication between you and the Residential Life staff
5. Make decisions for my area. (R-4)

6. As of August 12, 1997, the date Mayrl reassigned complainant to the position of Senior Student Services Program Manager she had not prepared such a response, nor had she taken any steps to resolve the controversy between her and Rand. Complainant had sent Rand two July 24, 1997, emails which would reasonably have been expected to worsen the relationship between Rand and Complainant. The first email (R-14) consists of a few lines, and directs Rand not to speak to other members of management about issues she has with complainant without going to her (complainant) first, to speak directly with complainant before she leaves work, and to tell complainant the day before when she plans to leave work. The second email (R-15) includes several criticisms of things Rand had done along with some directives, including the following: "I expect that you will overcome your reputation formed last year of having favorite employees, who can do no wrong and others, who can do no right; ones that get all the attention and ones that are treated as non-people."

7 Mayrl gave complainant the assignment of investigating allegations of sexual harassment and sexual assault that had been made against Tyrone Henderson, a program direc-

tor under complainant's supervision who served on a one year fixed term contract. Mayrl reached the conclusion that he did not want to hire Henderson after his term under the contract expired, for reasons independent of the sexual misconduct allegations he had directed complainant to investigate--i. e., issues concerning athletics and food service. Mayrl told complainant repeatedly and explicitly not to discuss with Henderson the reasons for the nonrenewal. Respondent was not required to provide Henderson with a reason why he was not being given another contract, and Mayrl did not want to run the risk that the reasons for the nonrenewal would become confused with the continuing investigation being conducted by complainant.

8. Contrary to Mayrl's directives, complainant did discuss with Henderson the reasons for his nonrenewal, on or about June 17, 1997.

9. In his June 19, 1997, meeting with complainant, Mayrl raised concerns about the turnover of employees under complainant who had been hired, and who were no longer employed by respondent, over the course of the approximately seven prior years. At that time, eight of the ten senior staff/program managers who had reported to complainant were no longer employed by respondent. Of the two remaining employees, one was in a financial position, and the other was Rand, who at the time had a very precarious relationship with complainant.

10. The circumstances surrounding the departure of those eight residence life employees reflected on this record were as follows:

- a. Felicia Bumpus started employment as a program manager in July 1990. She left in June 1992. There is nothing in the record about the circumstances of her departure.
- b. Michelle Couvelier started employment as a program manager in July 1996. She left in June 1997 when complainant did not rehire her due to performance reasons.
- c. Michael Daley started employment as a program manager in August 1992. He left in June 1993 because he was unhappy as a "small fish in a small pond," T 223, compared to his previous employment at Cornell University, he was un-



happy with the way he was treated by the people who worked for him, and he decided to pursue a Ph. D. full time as soon as this became possible.

- d. Richard Gagliano started employment as a program manager in June 1991. He left abruptly in October 1996 after he decided to resign rather than to stay at UWM and deal with a very serious charge against him.
- e. Tyrone Henderson started employment as a program manager in June 1996. He left in June 1997 when his contract was nonrenewed for the reasons discussed above in Finding #7
- f. Mary Janz started employment as a program manager in August 1992. She left in May 1993 because complainant did not renew her employment contract for performance reasons.
- g. Jarvis Sanford started employment as a program manager in July 1993. He left in February 1995 to take a better job.
- h. Catherine Thomas started employment in June 1989. She left in August 1991 when her husband accepted a job out of state.

11. No one in management had brought the issue of excessive turnover to complainant's attention as a matter of management concern prior to her June 19, 1997, meeting with Mayrl.

12. Effective August 12, 1997, respondent removed complainant from her position of Director of Residence Life and reassigned her to an academic staff position of Senior Student Services Program Manager (August 12, 1997, letter from Mayrl to complainant, Respondent's Exhibit R-9). She was replaced by Scott Peak, who was not noticeably disabled.

13. Subsequent to complainant's reassignment and replacement by Peak, Rand left UWM, but this was not held against Peak by respondent. Peak did not have a history of high turnover among program managers when this occurred.

#### CONCLUSIONS OF LAW

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

2. The complainant has the burden of proof to establish there is probable cause to believe, as the term “probable cause” is defined by §PC 1.02(16), Wis. Adm. Code, that respondent discriminated against complainant on the basis of disability with respect to the decision to remove<sup>2</sup> complainant from the position of Director of Residence Life and reassign her to the position of Senior Student Services Program Manager.

3. Complainant has failed to satisfy her burden of proof to establish there is probable cause to believe, as the term “probable cause” is defined by §PC 1.02(16), Wis. Adm. Code, that respondent discriminated against complainant on the basis of disability with respect to the decision to remove complainant from the position of Director of Residence Life and reassign her to the position of Senior Student Services Program Manager.

4. There is no probable cause to believe that respondent discriminated against complainant on the basis of disability with respect to the decision to remove complainant from the position of Director of Residence Life and reassign her to the position of Senior Student Services Program Manager.

#### OPINION

This is a probable cause determination. “Probable cause” is defined as “a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint.” §PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits. *See Boldt v. LIRC*, 173 Wis. 2d 469, 496 N. W. 2d 676 (Ct. App. 1992). Although the burden of showing probable cause is on the complainant, the “standard of proof at a probable cause hearing is low.” 173 Wis. 2d at 476. In *Boldt*, the Court stated that the concept of probable cause “focuses on probabilities, not possibilities. [The rule] adopts the viewpoint of a

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<sup>2</sup> This transaction was not a literal demotion under the civil service law, because the complainant’s position of Director of Residence Life was not in the classified civil service. *See* §ER 1.02(8), Wis. Adm. Code. While an adverse employment action is a necessary element of a WFEA discrimination complaint, *see, e. g., Klein v. DATCP*, 95-0014-PCC-ER, 5/21/97, respondent has conceded this element, see respondent’s hearing memorandum, p.4.

prudent, rather than a speculative, imaginative, or partisan person. As such, it contemplates ordinary, everyday concepts of cause and effect upon which reasonable persons act. It is [the adjudicative agency's] duty to consider the facts of each case and determine whether they meet this fluid concept." 173 Wis. 2d at 475-76. The findings of fact in this decision and the ultimate conclusion on probable cause are based on the standard of proof set forth in *Boldt*.

In *Winters v. DOT*, 84-0003-PC-ER, 9/4/86, the Commission characterized the concept of probable cause as "'not synonymous with 'preponderance [of the evidence],' being somewhere between 'preponderance' and 'suspicion.'" P. 17 (citation omitted); *See also Hintz v. Flambeau Medical Center*, Labor and Industry Review Commission (LIRC), 8/9/89 (Probable cause requires less than a preponderance of the evidence and can be characterized as somewhere between preponderance and suspicion, citing *Winters*.). In a probable cause proceeding, the Commission is to weigh all the evidence, and to consider the credibility of the witnesses, in making its determination. *Winters v. DOT*, 84-0003-PC-ER, 9/4/86; citing *McLester v. Personnel Commission*, 84-1715 (Ct. App. 1985) (unpublished), and "is not limited to merely examining whether the petitioner has presented evidence which, if believed, would be sufficient to support his claim." *Winters*, p. 16; *Boldt v. LIRC*, *id.*

The foregoing authority conflicts with complainant's argument that the Commission must find probable cause if there is any credible evidence in the record to support a claim of discrimination, even if such evidence is disputed or outweighed by contrary evidence, for which complainant cites *Christner v. LIRC*, Dane Co. Cir. Ct. #159-303, 6/6/78. However, *Boldt v. LIRC*, *id.*, is directly contrary to complainant's contention. The Court of Appeals specifically held there that:

LIRC is entitled to make credibility determinations at probable cause hearings . . . Nor does "any credible evidence accurately define the test LIRC is to use. Some credible evidence of discrimination might exist, but LIRC could still conclude that upon all of the evidence . . . it was not probable that discrimination occurred. 173 Wis. 2d at 475.

Under the WFEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in

turn, attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). The *McDonnell Douglas* framework is a useful tool in a probable cause proceeding, notwithstanding that the standard or level of proof required is less rigorous than in a hearing on the merits. *Larson v. DILHR*, 86-0019-PC-ER, 1/12/89.

Complainant alleges she was discriminated against based on her disability when she was effectively demoted by her removal from her position as Director of Residence Life and reassignment to her concurrent academic staff status in the position of Senior Student Services Program Manager

In the case of a demotion (or, as here, an effective demotion), the elements of a prima facie case are that: 1) the complainant is a member of a group protected under the WFEA, 2) the complainant was qualified for the job, 3) the complainant was demoted, and 4) the complainant was replaced by someone not in the protected group, or others not in the protected group were treated more favorably. *Puetz v. LIRC*, 126 Wis. 2d 168, 173, 376 N. W. 2d 372 (Ct. App. 1985).

In this case, the protected basis asserted is "individual with a disability," which is defined in the WFEA at §111.32(8), Wis. Stats.

- (8) "Individual with a disability" means an individual who:
- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
  - (b) Has a record of such impairment; or
  - (c) Is perceived as having such an impairment.

The key piece of evidence with regard to the question of whether complainant has a "physical or mental impairment which makes achievement unusually difficult or limits the capacity to work," *id.*, is Complainant's Exhibit C-11, a February 5, 1998, letter written by an orthopedic surgeon which includes the following:

Patricia Prischman has been under my care for severe disability in her knees. She initially presented to me in April, 1996 at which time she was a 50 year old woman with severe osteoarthritis in the knees. She has required use of chronic

narcotic pain medications to manage her symptoms but remains severely limited. She has a marked limitation of her walking tolerance and walks with a cane.

In summary [complainant] continues to have severe disability from osteoarthritis in the knees. This is greatly compounded by her [morbid] obesity.<sup>3</sup> She will require ongoing treatment for this which in the present form is being managed with narcotic medications.

In addition to this clear evidence of the existence of a disability, there was considerable other evidence of complainant's difficulty with mobility. Thus complainant has established she has been an individual with a disability at all relevant times.

Related to this element is respondent's contention that complainant did not establish that her supervisors (Mayrl and Hamann) were aware of her disability. However, both supervisors were well aware of complainant's mobility problems and difficulty with walking, and both asked her whether she needed accommodations. While a conclusion of liability normally requires that the employer be aware of the employee's disability, *see e. g., Boldt v. LIRC*, 173 Wis. 2d 469, 477-78, 496 N. W. 2d 676 (Ct. App. 1992); *Sheskey v. DER*, 98-0063-PC-ER, 8/26/98; when the supervisors are aware of the obvious physical manifestations of an actual disability subsequently established at hearing, there is no requirement under the WFEA that they have been aware of the employee's actual diagnosis, or have reached a subjective conclusion that the employee was disabled under the WFEA, at the time of the alleged discriminatory act.

As discussed above, complainant was effectively demoted on August 12, 1997, when she was removed from her position of Director of Residence Life and reassigned to her concurrent academic staff status in the position of Senior Student Services Program manager. She was replaced by Scott Peak. There is enough evidence in the record from the testimony of complainant and members of management that no one at Peak's level of management was visibly disabled, to support a finding, at the probable cause level of proof, that complainant was replaced by a person who was not disabled.

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<sup>3</sup> While there was on this record some peripheral mention of complainant's morbid obesity as a possible separate basis for a disability under the WFEA, neither party has directly addressed this point, and the Commission makes no determination on that question.

In response to complainant's prima facie case, respondent satisfied its burden of articulating a non-discriminatory rationale for its decision by providing three reasons for removing complainant from her position: 1) there was excessive turnover among her subordinates; 2) complainant failed to comply with Mayrl's directive to resolve the dispute between her and subordinate Valarie Rand, and specifically to provide a written reply to Rand's June 5, 1997, memo to complainant (Respondent's Exhibit R-4), which had requested that complainant provide written goals and expectations with regard to five specific areas of her duties and responsibilities; and 3) complainant failed to comply with Mayrl's specific, repeated instructions not to discuss with Tyrone Henderson the reasons for his nonrenewal.

With regard to the excessive turnover reason, complainant attempted to establish pretext by showing that the staff turnover was not excessive in the context of the type of jobs involved and the reasons why most of the employee left, by showing that this issue never was brought to her attention as a matter of management concern prior to her removal, and by showing that when Rand left UWM while under Peak's supervision, this was not held against him (Peak) by management.

Complainant presented evidence as to the reasons for departure of most of the program managers in question. These reasons ranged from professional advancement (e. g., Sanford) to a spouse relocating (e. g., Thomas), to nonrenewal for what amounts to cause (e. g., Henderson). Respondent did not present any evidence that it had either any feedback from any of the employees in question, via exit interviews or otherwise, or other evidence that they left because of dissatisfaction with complainant's supervision. Complainant's testimony that management never spoke to her about excessive staff turnover until her June 19, 1997, meeting with Mayrl also stands un rebutted. However, little if any weight is given to the fact that management did not hold it against complainant's successor (Peak) when Rand left while he was her supervisor. As Mayrl said, that situation occurred in a different context. Unlike the situation with complainant, there is no indication that the transaction occurred as part of a pattern of nonrenewals under Peak's supervision.

Therefore, there is some evidence of pretext associated with respondent's first reason for complainant's removal. However, this case differs from an appeal of a disciplinary action

where the employer has the burden of proof to establish just cause for the action, *see, e. g., Reinke v. Personnel Board*, 53 Wis. 2d 123, 137-38, 191 N. W. 2d 833 (1971). Here, the burden is on complainant to show that respondent's action was motivated by a discriminatory reason. *See Mitchell v. DOC*, 95-0048-PC-ER, 8/6/96; *see also Russell v. DOC*, 95-0175-PC-ER, 4/24/97.

A conclusion that there was no just cause for the discharge does not equate to a conclusion that respondent was illegally motivated. An employer's mistaken belief or inability to prevail at a hearing or arbitration is not necessarily inconsistent with a good faith belief, independent of complainant's [protected status under the WFEA] that discipline was warranted. However, the less support there is for the charges, the more likelihood there is of pretext. *Id.* at p.5.

Notwithstanding that respondent did not present evidence on this record that the turnover in complainant's staff was attributable to problems with complainant's performance as a supervisor, the fact remains that there was significant turnover.

As to the complainant's failure to resolve the dispute between her and Valarie Rand, and to provide a written response to Rand's June 5, 1997, memo requesting written goals and expectations (Respondent's Exhibit R-4)<sup>4</sup>, there is no dispute that complainant failed to provide such a written response prior to the time she was removed on August 12, 1997. In an August 13, 1997, email to Mayrl (Respondent's Exhibit R-8), she specifically states she has "started" such a letter. To the extent complainant relies on some emails she sent to Rand following complainant's June 17, 1997, meeting with Mayrl (Respondent's Exhibits R14 and R 15) as compliance with respondent's directive, Mayrl did not regard them that way, and he had a reasonable basis for his opinion. The July 24, 1997, email (R-14) consists of a few lines, and directs Rand to do two things--not to speak to other members of management about issues she has with complainant without going to her (complainant) first, and to speak directly with com-

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<sup>4</sup> Complainant objected to communications from Rand, such as emails identified as R-4 and R-5, as hearsay (Rand was not a witness). Laying to one side that the Commission is not bound by the common law or statutory rules of evidence, §PC 5.03(5), Wis. Adm. Code; §227.45, Wis. Stats., and the Commission's rules permit the receipt of hearsay evidence in the discretion of the examiner, §PC 5.03(5), Wis. Adm. Code; these documents would not be considered hearsay in any event, because statements by Rand are not being considered for the truth of the matters asserted. For example, R-4

plainant before she leaves work, and to tell complainant the day before when she plans to leave work. The other email of that date (R-15) includes several criticisms of things Rand had done along with some directives, including the following: "I expect that you will overcome your reputation formed last year of having favorite employees, who can do no wrong and others, who can do no right; ones that get all the attention and ones that are treated as non-people." (Respondent's Exhibit R-15, email of July 24, 1997, 4:11 p. m.) These emails were practically guaranteed to make matters worse between complainant and Rand, and cannot reasonably be interpreted as a written response to Rand's request for:

**[W]ritten goals and expectations for me in my position as the Assistant Director for Residential Life in order to facilitate a successful academic year for my staff and for me.**

The specific areas in which I need your written expectations are stated below. Essentially, I am seeking clarification that would answer the question, "What are you expecting of me as I

6. Supervise the Residential Life staff
7. Manage and Develop the residential life programs
8. Work as a member of your director and staff team
9. Seek to effectively communicate with you and to foster communication between you and the Residential Life staff
10. Make decisions for my area. (R-4)

Regardless of complainant's opinion about this memo, once Mayrl directed her to respond to it in the following manner, complainant certainly should have been aware that her emails not only would not comply with Mayrl's instructions, but also would be seen as counterproductive:

On June 5, Valarie gave you a memorandum which listed the major responsibilities of her position, along with a request that you provide her with written clarification of how you expect her to carry them out. As I mentioned in our meeting, I think that her request is reasonable. Indeed, Pat, such a specification of expectations will give you the opportunity to include dimensions of the assistant's director's role which might not be apparent in the position description. It will also provide both you and Valarie with objective guidelines to evaluate your professional relationship. For my part, as I indicated, I intend to monitor that relationship and to offer my assistance in dealing with problems that you and

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and R-5 show Rand's requests for clarification of complainant's performance expectations for her (Rand).



she may have difficulty working out. I look forward to receiving a copy of your response to Valarie's memorandum. (R-7)

The third reason respondent gave for reassigning complainant was her failure to follow Mayrl's explicit instructions not to discuss with Henderson the reasons for his nonrenewal. The record reflects that Mayrl knew that respondent was not required to tell Henderson why he was being nonrenewed, that he did not want this to happen because of the possibility that this could confuse the independent reasons for Henderson's nonrenewal (issues concerning athletics and food service) with the ongoing investigation concerning allegations of sexual assault and sexual harassment, that he made it very clear to complainant that he did not want her to discuss the reasons for his termination with Henderson, and that notwithstanding his directives, complainant went ahead and had this discussion with him. Among other parts of the record that supports this finding, complainant in effect admits this in her June 19, 1997, email to Mayrl (R-10):

Later, after Tyrone [Henderson] was scheduled to come in and clean his desk, she [Rand] asked me to speak to him. She said he was young, confused, did not understand, would I tell him why. I wasn't going to say a word but the teachable moment person jumped in. When Tyrone arrived he was well coached, aggressive, and ready for a fight. I told him several periphery [sic] items that led me to believe that his reputation was such that it would be difficult to continue in the job. I told him the investigation was not over.

One collateral aspect of this issue which generated a lot of controversy at the hearing involved an audio tape respondent's attorney represented to be a recording of the meeting between Henderson and complainant referred to in R-10, and what she represented to be a typed transcript of that tape, Exhibits R-28 and R-27, respectively. Neither exhibit was offered in evidence, but respondent played a brief excerpt from the tape in an attempt to impeach complainant's testimony about what happened at that meeting. Complainant's attorney objected to the playing of the tape for two reasons—hearsay, and lack of foundation. Laying to one side the facts that the Commission is not bound by the common law or statutory rules of evidence, §PC 5.03(5), Wis. Adm. Code; §227.45, Wis. Stats., and the Commission's rules permit the

receipt of hearsay evidence in the discretion of the examiner, §PC 5.03(5), Wis. Adm. Code,<sup>5</sup> any statements on this tape by *complainant* would not be considered hearsay anyway, *see* §§908.01(4)(a)1., (b)1., Wis. Stats. Any statements by *Henderson* would not be considered hearsay because they are not being offered for the truth of the matters asserted by him--i. e., the conversation was offered to attempt to impeach complainant's testimony regarding what transpired in this conversation, not to try to establish the truth of what Henderson was saying.

With regard to the question of foundation, the examiner allowed respondent to play part of the tape because a foundation could have been provided through complainant's testimony if she had testified that the tape reflected statements she had made during this meeting. T 204-208. However, no such foundation was made, inasmuch as while complainant admitted it was her voice on the tape, she also testified that "[t]he tape is falsified." T 209. Since there was no other even putative foundation for the tape, and complainant's testimony that the tape was falsified is totally un rebutted, there is no foundation for the part of the tape that was played during the hearing, and the Commission does not accord any weight to the statements on the tape, for impeachment or for other purposes. However, there is sufficient evidence in the aforesaid email (R-10), complainant's testimony, and Mayrl's testimony to support the finding that, contrary to Mayrl's directive, complainant discussed with Henderson the reasons for his nonrenewal.

Complainant's attempts to establish what could be characterized as direct evidence of discrimination were unavailing. The Commission gives little or no weight to complainant's testimony that she perceived her supervisors looking at her with what she perceived as disdain or disgust, which she in turn attributed to her supervisors' repulsion with her appearance and obvious mobility problems. For example, her testimony included the following concerning Mayrl.

Q What did you--why do you think Bill Mayrl terminated you?

A I think that--I had some concern about him for a long time of the way he looked at me, the way he--it's two different people. Bill Mayrl would call me, Bill Mayrl would visit, Bill Mayrl would ask me a lot of things, including how

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<sup>5</sup> "Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances."

he should supervise my supervisor [Hamann]. Isn't that interesting? I mean, this man came to my office I would say one, two times a month. He would show up. We just talked about things, talked about students, talked about different things. And when we were talking or when we were on the phone, he was very animated, very supportive. He was very up, everything was like this.

But when--seemed like when he turned the corner and looked at me, he changed. Like if I could wear a veil, he would just have loved my performance. But once it was off, uh. He would sit across from me, and in meetings he would snarl, just like looking at my arms, and he just--you know snarl his face and things like this. He would watch me walk down the hallway. He would--when we were in these big meetings, it was over--say the director of the bookstore and the dean of students one time were going to help me out of the chair. They came over, they stood by me. Everybody was leaving, and Elmer--Bill Mayrl was talking to the people leaving, stopped, stood in the door, folded his arms and just watched me. And the two other people were so nervous they're going get up, get up, get up, you know, come on, come on, to get out of there. So I walked past him, to get the attention off of them so they could split, and I started talking to him, something like this. And then he still was folding his arms watching me walk. Just makes your skin crawl. Just--

Q Would you just describe the movement you just did with your face for the record?

A Snarl, just disgust. T 173-75.

Complainant also testified as follows:

Q Did there come a time when you began to notice a change in the attitude of Bill Mayrl or Elmer Hamann towards you?

A Yes.

Q And when was that?

A In spring of '96.

Q And what did you begin to notice?

A Much distaste, much glaring, staring.

And all through the meeting, every time I looked at Elmer [Hamann], I get this disgusted look, glare, looking at my shape, looking me up and down. Really sad

Q To what did you attribute his stares and glares ?

A My size, my size. I mean I can't imagine him being upset that I wasn't at the table. So had to be my size. It had to be looking at my legs, looking--just like makes your skin crawl. It was terrible.

Q What beside that incident can you point to?

A Just the general--how would I say it--disrespect, just general disrespect. It's been growing since about '96; '95, 96. Just it is as if I'm in his way. He doesn't want to work with me. Just it's just-- T 155-58.

This amounts to complainant's subjective evaluation of Mayrl's and Hamann's subjective states of mind. This evidence is too attenuated to add any appreciable evidence of pretext to complainant's case.

The other asserted direct evidence of discrimination involves the meeting between complainant and Mayrl that occurred on June 16, 1997. According to complainant's testimony, Mayrl was very agitated and angry, he slammed the door when he came in her office, he told her he couldn't keep coming to her office to meet with her, and then:

[H]e sat down, slapped the desk. He said, what do I have to do to get you to do your job, buy you a cart? I was so stunned. I want to tell you this is a man who has been in my office for years. This is a man who was always saying hang in there, very supportive, you're doing a wonderful job. You go to his meeting, he says what is new in the residence halls? I'm happy with the job you're doing, isn't this great what they're doing, on and on and on. All of a sudden--what do you mean I didn't do my job? What are you talking about? T 177

Mayrl denied this account of the meeting. He testified he was neither agitated nor angry. He said that at the end of the meeting he started to raise the issue of whether complainant needed an accommodation out of concern for complainant's comfort, not because he had any concerns about her physical ability to do her job, but that she denied she needed anything.<sup>6</sup> Mayrl also said that before the meeting he had met with Jeantz Martin, respondent's ADA coordinator, for the specific purpose of exploring with her how he could broach the topic of whether complainant needed or wanted an accommodation, and this conversation was corroborated by Martin. While the level or standard of proof in this proceeding is less than the preponderance which would be required at a hearing on the merits, the complainant still has the burden of proof to establish that

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<sup>6</sup> Complainant admitted that this was her response.

Mayrl's behavior in their June 16, 1997, meeting was as she testified. *Boldt v. LIRC*, 173 Wis. 2d 469, 475-76, 496 N. W. 2d 676 (Ct. App. 1992). In the Commission's opinion, she has not satisfied this burden.

Complainant also apparently argues that there was direct evidence of discrimination in connection with the accessibility of the office to which she was assigned after her reassignment to the position of Senior Student Services Program Manager. However, there is no evidence that complainant brought any concerns she may have had about this office to the attention of management, no less that management failed to respond to such concerns.

It is unclear to what extent complainant is trying to argue that there is any evidence of pretext based on a failure to accommodate.<sup>7</sup> In any event, complainant in her role as Director of Residence Life had the authority to have obtained any kind of device that might have helped her with regard to her disability--e. g., a motorized cart or different chair--and there is no evidence that complainant requested anything by way of an accommodation that was denied. There is no evidence of pretext in this regard.

Other evidence probative of pretext is provided by complainant's long tenure at UWM (since 1975), and the fact that her performance evaluations over the course of the last several years in question were at least average. However, the evaluations contained some critical comments. For example, her evaluation for calendar year 1996 (R-24) refers to her performance as "uneven" and notes a degree of failure to provide "a clear communication of the mission, a sense of when to cut off input and the ability to focus on and select solutions which serve the mission," and also that "some of the policies and practices that are created and engaged in by her staff are counterproductive." Her evaluation for calendar year 1995 (R-25) characterizes complainant's overall performance as "satisfactory," and states that "she has often been too passive allowing less than satisfactory performance to occur without intervention.

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<sup>7</sup> There was no accommodation question per se identified as an issue for hearing, so that question can not be considered a claim by complainant at this stage of the proceeding. While during the hearing there was some testimony having some relationship to this area, complainant's attorney did not contend in her final argument that there was a failure to accommodate that was evidence of pretext. T 446-49; 454-55.

It is important that Pat take the word 'Director' literally and apply it to herself in her role."

These factors have to be weighed against the points that complainant clearly failed to comply with management's directives in the Rand and Henderson matters, and did have a high turnover of program managers, albeit that respondent failed to provide evidence to rebut complainant's showing that the turnover of staff was not necessarily attributable to performance deficiencies by her. Furthermore, complainant was serving in a limited appointment position, in which she had a one year appointment at the pleasure of the appointing authority, which did not carry any job security, and when Mayrl removed complainant from the Director of Residence Life position she was not separated from employment at UWM, but reassigned to an academic staff position where she had a form of tenure.

In conclusion, the Commission determines that while there is some evidence supporting complainant's case, there is not sufficient evidence in the context of the entire record to support a conclusion that there is probable cause to believe that respondent was motivated by complainant's disability in connection with its decision to reassign her from her Director of Residence Life position to the position of Senior Student Services Program Manager. Notwithstanding complainant's long employment and mostly satisfactory performance record at UWM, Respondent had legitimate reasons to have been displeased with complainant's performance.

First, complainant failed to comply with Mayrl's directives to resolve the dispute between her and Rand, and to respond to Rand's request for specific written job expectations. It appears that complainant and Rand were involved in a power struggle. It is not the Commission's role to try to make judgments about which of these individuals was right or wrong in that regard. Rather, the Commission must evaluate the record for evidence that respondent was motivated by complainant's disability. Complainant not only failed to comply with Mayrl's directives to provide a written response to Rand's explicit request for an enunciation of performance expectations, and to resolve the dispute between complainant and Rand, but also she responded to Rand with acerbic emails (Respondent's Exhibits R-14, R-15) that were almost guaranteed to make the dispute worse. There is no evidence of pretext with regard to this factor.

Second, complainant also failed to comply with Mayrl's repeated directives that she not discuss with Henderson the reasons for his nonrenewal. Mayrl's directives were fully within his prerogatives as a manager. As discussed above, there was no obligation to provide any reasons for this action, and under the circumstances, which included the ongoing investigation of Henderson with regard to charges of sexual harassment and sexual assault, Mayrl's position that he did not want to run the risk of confusing that investigation with the reasons for nonrenewal was reasonable.

The third factor was the attrition rate of the program managers under complainant's supervision. There is no question but that it was high. Complainant's explanations of the reasons for their departure tend to show that some of this attrition rate were not her fault. As discussed above, this evidence is probative of pretext, but to a limited extent. Even if respondent were wrong in its assessment of the situation, this does not mean respondent was motivated by discriminatory considerations in making its decision.

Complainant's attempts to show direct evidence of pretext relies to a large extent on her subjective impression of Mayrl's and Hamann's subjective reactions to her, and to other evidence that carries little if any weight. While there is some evidence of pretext with regard to respondent's concerns about excessive turnover of her higher level staff, in the context of the entire case, which includes clear evidence of failure to comply with Hamann's directives concerning Rand and Henderson, there is insufficient evidence to support a conclusion of probable cause.

ORDER

The Commission having concluded that there is no probable cause to believe respondent discriminated against complainant as she alleged, this case is dismissed.

Dated: \_\_\_\_\_, 2002.

STATE PERSONNEL COMMISSION

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ANTHONY J. THEODORE, Commissioner

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