STATE OF WISCONSIN PERSONNEL COMMISSION

PATRICIA E. RUSSELL HARRSCH,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 99-0023-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of disability discrimination. A hearing was held on June 6, 7, and 8, 2001, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on August 20, 2001. After consulting with the hearing examiner, the Commission made certain substantive changes to the Proposed Decision and Order. These changes are reflected in the Findings of Fact by alpha footnotes, and in the body of the Opinion section. None of these changes disturbed the credibility assessments of the hearing examiner.

The statement of issue for hearing to which the parties agreed is:

> Whether complainant was discriminated against on the basis of disability with respect to the following:
>
> 1) Complainant was allegedly restricted from driving on work-related business in April, 1997,
> 2) Complainant was allegedly informed in July, 1997 that she would be fired if she did not hire a driver,
> 3) Complainant was removed from a lead survey assignment after experiencing an insulin reaction in August, 1997.
> 4) Complainant's work performance was rated as "unacceptable" around April, 1998,
> 5) Complainant was placed on administrative leave on June 30, 1998, and required to have independent medical examinations, and
> 6) Complainant was allegedly informed on November 5, 1998, that she would be medically terminated if a 30-day job search was not successful.

FINDINGS OF FACT

1. Effective September 4, 1994, complainant was appointed to a Nursing Consultant 1 position in the Bureau of Quality Compliance, Division of Health, Department of Health and Social Services (respondent's predecessor agency), in Madison, Wisconsin. Stephen Schlough was complainant's first-line supervisor in this position. The position description for this position included the following goals, in relevant part:

> A. (20%) Development, establishment and maintenance of a psychiatric interdisciplinary team to conduct Inspection of Care (IOC), i.e., Title XIX patient reviews, and surveys for state rules and federal Conditions of Participation governing acute psychiatric hospitals.
>
> B. (20%) Conduct federal surveys of psychiatric, rehabilitation units of hospitals to determine eligibility into the Prospective payment exemption (PPE) program.
>
> C. (20%) Conduct approval, certification and/or validation surveys statewide of Acute General and Alcohol Hospitals, providers for Federal Title XVIII/XIX Conditions of Participation and applicable Wisconsin Administrative Code requirements.
>
> D (20%) Conduct investigations of complaints received from all sources against providers listed in Sections A and D.
>
> E. (10%) Review and research issues including Bureau and Hospital and Health Services Section programs.
>
> F (10%) Develop drafts of section resource documents, workplans and support activities, including revisions to the hospital code, development of rule interpretations, response letters to providers, legislatures and the public, and drafting of program procedures.

This position description states that one of the special requirements is statewide travel. One-half of the surveys conducted pursuant to Goal B involve small facilities to which a single surveyor would be assigned; and essentially all of the investigations conducted pursuant to Goal D would be conducted by a single investigator.

2. Schlough was aware from early in complainant's employment that she has Type 1 diabetes which requires frequent blood sugar monitoring, administration of

insulin, and meal scheduling, among other things. Also since that time, Schlough has had Type 2 diabetes which he controls primarily through diet and exercise.

3. The evaluations of complainant's work performance completed by Schlough for the period November 1994 to November 1995 showed satisfactory performance in all areas.

4. Complainant experienced a pattern of problems prioritizing/scheduling the 1995 Mendota Mental Health Institute (MMHI) IOC survey, made significant errors completing 6 of her 11 assigned surveys between April 15 and August 15 of 1996, did not satisfactorily complete packet preparation in the four months prior to the 1996 MMHI IOC survey, and did not otherwise properly complete preparations for the 1996 MMHI IOC survey. As a result, in August or September of 1996, Schlough reassigned the lead surveyor responsibility for the 1996 MMHI IOC survey from complainant to another staff person.

5. The evaluation of complainant's work performance completed by Schlough for the period November 1995 to November 1996 indicated that complainant's performance needed improvement in regard to each key responsibility, other than that related to developing effective working relationships, due to failure to complete assigned work in a timely and accurate manner. None of the other surveyors under Schlough's supervision was failing to complete work by established deadlines.

6. Prior to June of 1997, Schlough became aware that complainant had experienced two hypoglycemic incidents resulting from her diabetes at the work site. Complainant became non-functional and non-responsive during these incidents.

7. As a result of these hypoglycemic incidents, Schlough became concerned about complainant continuing to drive for work purposes. He consulted with Gladis Benavides, Director of respondent's Office of Affirmative Action and Civil Rights; Muriel Harper, Director of respondent's Employee Assistance Program; and Earl Kielley, of respondent's employment relations unit, to obtain their advice in regard to this concern. It was the consensus of this group that complainant obtain clearance from a physician before being allowed to continue to drive for work purposes.

8. Gary Yap, complainant's personal physician, directed a letter dated June 20, 1997, to Schlough, relating to complainant's fitness for driving. In this letter, Dr. Yap indicated that complainant should drive only if her blood sugar was above 100; that she should check her blood sugar every two hours; that she should drive with extreme caution; and that he was not able to predict whether complainant would have a hypoglycemic incident while driving.

9. Based on this letter from Dr. Yap, Schlough, Benavides, Harper, and Kielley concluded that complainant would no longer be permitted to drive for work purposes. Respondent had previously made a similar decision in regard to six other employees. This group considered various alternatives and concluded that the cost to respondent of paying for a driver for complainant was too great, respondent had not budgeted for such an expense, the department did not have an authorized position which could be utilized to hire a driver for complainant, public transportation to the locations complainant's position required her to travel was not usually available, and the driving requirement should not be removed from complainant's position since it was an essential function of the job.

10. In a letter to complainant dated July 2, 1997, from Dan Crossman, Unit Chief within the Division of Supportive Living (in which the Bureau of Quality Assurance, the successor to the Bureau of Quality Compliance, was then located), stated as follows, in relevant part:

> In response to several incidents of loss of blood sugar control in the office in which we had to seek the assistance of the emergency medical technicians for you, we have been assessing your capabilities to perform the requisite job duties of your position description. We have concluded that it is not safe to have you driving a vehicle on state business based on the following information.
>
> 1. Your doctor, in a letter dated June 20, 1997 has indicated that in his opinion you could drive "but should do so with extreme caution." Also, "I am not able to predict at any time whether she will have a hypoglycemic reaction while driving."
>
> 2. You had a hypoglycemic reaction on July 1, 1997 in our office where we again had to summon assistance from the EMT's which indicates that these reactions are still occurring.

> 3. While we were waiting for the report from your doctor we have been providing accommodation by allowing you to ride with other surveyors to accomplish your assigned reduced workload. This has been inefficient and has resulted in increased cost to our section.
>
> In the interest of providing you with an accommodation we will allow you to continue to work if you secure the services of another driver at your expense to transport you to the assigned locations where your work is to be performed. If this option is acceptable we will need your concurrence by July 9, 1997. We will also need to know the name of the driver and be provided with documentation that you are not driving on state business.

In response to this letter, complainant notified respondent that she would not be retaining the services of a driver.

11. In a letter to complainant dated July 30, 1997, Gerald Born, Administrator of respondent's Division of Supportive Living, stated as follows, as relevant here:

> In answer to your letter of July 19, 1997, it is the employer's conclusion that your response to the request that you provide a driver to assist you in meeting the transportation requirements of your job duties is not viable.
>
> According to the letter from your doctor dated June 20, 1997, you are no longer able to perform the essential job duties of a Nurse Consultant 1-Health Facility Surveyor since you can no longer drive except with extreme caution. Also, he is not able to predict at any time whether you will have a hypoglycemic reaction while driving.
>
> Due to the permanent nature of your disability, the employer will place you on a "transfer as an accommodation referral effort" in an attempt to find other jobs for you that would be comparable (sic) with your disability. Attached you will find the DMS-901 Transfer as an Accommodation Referral Information form. To help you complete this form and to search for other positions in the Department, please contact Terri Rankin in the Division personnel office. If the form is not received with (30) days, you will be separated from State employment.

12. During the summer of 1997, the Provider Regulation and Quality Improvement (PRQI) Section, Bureau of Quality Assurance, was recruiting for a vacant Administrative Rules Coordinator (ARC) 3 position. This position had been vacated when Larry Hartzke, the former incumbent, had resigned when his request for leave without pay to take an extended vacation was denied. There was no expectation at the

time of Hartzke's resignation that he would be returning to work in PRQI. Rankin brought this position to complainant's attention. Complainant contacted the supervisor of this ARC 3 position, Sandra Breitborde, and indicated her interest in the position. In a letter dated August 27, 1997, respondent confirmed complainant's voluntary demotion to this ARC 3 position. Complainant's pay rate was not reduced as a result of this voluntary demotion.[A]

13. The position summary for complainant's ARC 3 position states as follows:

> Under general supervision, this position reports to the Chief, Provider Regulation and Quality Improvement Section. This position is responsible for planning, monitoring and analyzing Bureau of Quality Assurance related programs, policies, projects and proposals, including, but not limited to, hospitals, nursing homes, facilities for the developmentally disabled, home health agencies, rural medical centers, assisted living facilities, adult family homes, community-based residential facilities, nurse aide training and registry, and HSS 117; developing guidelines, programs, and plans to enable the Bureau to carry out its responsibilities; coordinating development and promulgation of the Bureau's administrative rules, drafting new and revising existing statutory language related to the activities the Bureau is responsible for; monitoring and analyzing federal law, regulations, and policies; and providing technical assistance to the Bureau. This position also serves as the lead on specific analysis projects.

This position required extensive ability to interpret and analyze complex information and to summarize results in clear, concise and logically organized reports for both written and oral presentations.

14. Complainant was provided the standard training for those in ARC positions, i.e., she was provided written training information, she met with and received instruction from the Department rules coordinator, she met with other Department experts to obtain rule-related information, and she received frequent one-on-one training and feedback from her first-line supervisor and other supervisors. In addition to this standard training, complainant also received training from the position's former incumbent, i.e., upon his return in a limited term (LTE) position, Hartzke served as a consultant and mentor for complainant.

[A] This sentence was added for purposes of clarification.

15. Breitborde considered complainant's first three months of employment in the ARC 3 position as a training period. In the evaluation which she completed on or around December 29, 1997, Breitborde indicated that complainant's performance was satisfactory except as follows:

> 2a. .Employee has made errors in rule construction standards and has been informed of this during the training period. Employee will be held accountable for all rule and statutory construction standards during next PPD period.
>
> 6a. Unsatisfactory. September report prepared. October and November reports not prepared.
>
> 10a. .Needs to pay more attention to correct referencing of rules and statutes.

16. On February 10, 1998, complainant was involved in an automobile accident when she had a hypoglycemic incident while driving and lost control of her car. This accident did not occur while complainant was on work status. [B] As a result of this accident, complainant was on medical leave from February 10 to April 8, 1998.

17. Sharon Cooperrider (Hron) became complainant's supervisor in January of 1998. Cooperrider met with complainant for the first time on January 26, 1998, and met with her one additional time before complainant commenced her medical leave on February 10, 1998. Cooperrider met with complainant weekly upon complainant's return from leave in April. It was Cooperrider's typical practice to meet weekly with each of her subordinates.

18. Upon her return from medical leave in April of 1998, complainant's work performance did not meet standards. She failed to meet most deadlines, was unprepared for meetings, and her work had many errors and frequently lacked logical presentation. In addition, complainant asked the same questions repeatedly, failed to retain information, was unable to follow directions, and had difficulty grasping concepts. Cooperrider spent at least twice as much time reviewing complainant's work and

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[B] This sentence was modified to clarify that complainant was not on work status when she was involved in this accident.

providing feedback than she spent with other subordinates, including probationary subordinates, but complainant's work failed to improve and actually deteriorated.

19. During complainant's employment in the ARC 3 position, she experienced three or four hypoglycemic incidents at work during which she became non-functional and non-responsive.

20. Due to complainant's failure to meet performance standards, deteriorating performance, difficulty comprehending and retaining information, and the hypoglycemic incidents she suffered at work, respondent placed complainant on paid administrative leave in June of 1998 until a medical evaluation could be completed.

21. Complainant was evaluated by William Lytton, M.D., on June 30, 1998. Dr. Lytton, a neurologist, concluded as follows:

> Overall, Ms. Russell's examination seems completely normal. There is no evidence of neurological disease and no suggestion of cognitive impairment on the mini-mental examination. If further examination is desired, we could do formal neuropsychological testing, as well as more direct assessment of brain structure with MRI and of underlying brain activity with electroencephalogram.

22. Complainant was evaluated by Melissa Meredith, M.D., on July 7, 1998. Dr. Meredith, a diabetic specialist, concluded as follows:

> Ms. Harrsch has long-standing type 1 diabetes mellitus. She has mild chronic complications of her diabetes of nonproliferative retinopathy and a very mild peripheral neuropathy. The major problem related to her diabetes is one of hypoglycemic unawareness. This typically occurs in the setting that the patient has recurrent severe hypoglycemia. It is felt by many to be a reversible complication of her diabetes. Now that she is on her insulin pump therapy, her blood sugars should even out, and she should have a marked decrease in the number of hypoglycemic reactions. Hopefully, if she can avoid severe hypoglycemia for the next two to three months, she will regain some symptomatic awareness of her low blood sugars.
>
> In regard to how her condition affects her ability to perform her job, certainly in the midst of a hypoglycemic reaction, it would limit her ability to think clearly and make appropriate responses and decisions; however, since hypoglycemia is typically episodic, I doubt that it would account for a global decrease in her abilities.

> Of more concern is if her recurrent hypoglycemia has actually resulted in some permanent neurologic damage. I am unable to evaluate that in my testing. I would recommend that she undergo neuropsychologic testing to truly see what her capabilities are.

23. Cooperrider discussed with Harper the recommendations that complainant undergo neuropsychological testing. It was part of Harper's responsibilities to make the arrangements for independent medical examinations (IME's) once they were approved by management. After neuropsychological testing was approved for complainant, Harper arranged for complainant to be evaluated by William Merrick, Ph.D. Harper selected Dr. Merrick after he was recommended to her by several psychologists, because he had conducted IME's for respondent in the past and had been thorough, and because he was one of only a few neuropsychological testing specialists in Madison, Wisconsin.

24. After meeting with complainant four or five times, Dr. Merrick summarized his conclusions on September 11, 1998, as follows, in relevant part:

> Patricia Russell was referred for neuropsychological evaluation in order "to determine whether she has a medical and/or neurological condition which limits her ability to safely and competently perform her work."
>
> Present neuropsychological testing results demonstrated loss of overall intellectual capacities in comparison to estimated pre-morbid levels, bilateral fine motor deficits, mild graphesthesia in the fingertips, sequencing deficits, non-verbal reasoning deficits for unstructured cognitive material, mild deficits for attending to auditory and visual information, mild auditory verbal learning and memory deficits and moderate visual learning and memory deficits. She showed evidence of mild anxiety and depressed that likely have contributed a small degree to the present cognitive results but could not account for these completely.
>
> The neuropsychologic profile Ms. Russell produced is consistent with what is known of diabetics with cognitive deficits. Complex problem-solving tasks, word list learning tasks, and inattention characterize diabetics with cognitive dysfunction.
>
> In terms of its consequences, Ms. Russell's neuropsychological profile would suggest that she is now not capable of performing the essential functions of her job as described in the attached materials. She would have a very clear inability to "interpret and analyze complex information" and "to summarize results in clear, concise and logically oriented reports" and would be unable to do so in "written and oral presentations." She

> would have difficulty analyzing and synthesizing "complex technical information" that is required in her job and she would be incapable of the broad range of complex cognitive activities that are required in this position. At the present time, Ms. Russell should not be working in her capacity as a Rules Coordinator.

Complainant provided Dr. Merrick copies of evaluations conducted in 1982-84 indicating she suffered from certain mild learning disabilities.

25. Complainant took issue with certain of Dr. Merrick's conclusions and submitted additional comments and information for him to consider. Dr. Merrick subsequently indicated that he had considered these submissions but they had not changed his opinion.

26. As the result of Dr. Merrick's evaluation, respondent notified complainant in a letter dated October 6, 1998, of the intent to medically terminate her within 30 days, and of her opportunity to pursue a transfer as an accommodation during this 30-day period. On October 12, 1998, complainant completed a transfer as an accommodation form, listing 16 different classifications for which she felt she was qualified. These positions were in pay ranges comparable to complainant's Nursing Consultant or ARC 3 positions and required a comparable level of independent judgment and analysis. In a letter dated October 27, 1998, Rankin advised complainant that, based on Dr. Merrick's report, respondent had concluded that she was not able to perform the duties of the listed classifications. This conclusion was based upon the consensus opinion of Harper, Benavides, and Breitborde. Rankin had earlier advised complainant that there were vacant Food Service Worker, Food Service Laborer, and Program Assistant 1 and 2 positions available, but complainant had declined transfer/demotion into these positions, which were several pay ranges below her Nursing Consultant 1 and ARC 3 positions.

27. Also on October 12, 1999, complainant submitted to respondent a Disability Accommodation Request form. On this form, complainant requested the following accommodations:

1. Predetermined work and break schedule.
2. Written information/directions for complicated job assignments during initial training on those tasks.
3. Work performance feedback twice a month for first 3-6 months of a new job.

28. In a memo dated October 23, 1998, Benavides, in response to complainant's October 12 accommodation requests, stated as follows, as relevant here:

> This is in response to your request for reasonable accommodations submitted to Terri Rankin for review and response from my office. Your request was considered on the basis of the functions that you are required to perform in your present position. I also reviewed the medical statement submitted by your physician.
>
> Based on the review of all information available, I have determined that your medical condition, which is considered as being permanent, seriously affects your ability to perform critical functions of your job. I have thus concluded that the provision of the accommodation you have requested would result in undue hardship. It would also affect the business necessity of the program since it would impact on the ability of the Department to effectively implement program objectives and goals as required by the federal funding source.
>
> It is my understanding that Ms. Rankin, Human Resource Coordinator, is assisting you in identifying positions that you may consider under a transfer as an accommodation. Please note that when/if you are offered a position for which you are qualified and choose to accept it, we would, at that time, work with you and your supervisor to determine whether accommodations would be necessary.

Benavides based her conclusion that complainant's accommodation requests should be denied and she should be removed from her ARC 3 position on the fact that extensive coaching/training had already been provided to complainant with no resulting improvement in performance.

29. Complainant indicated that she continued to disagree with Dr. Merrick's evaluation and requested a second opinion. Respondent granted this request, and placed complainant on unpaid administrative leave until this second evaluation could be completed. Complainant's personal physician arranged for her to receive a neuropsychological evaluation by Austin Woodard, Ph.D., of University of Wisconsin Hospitals and Clinics. Dr. Woodard summarized his conclusions on December 16, 1998, as follows, in relevant part:

> Ms. Russell's mental status likely is very little changed since the first evaluations that she underwent in the early 1980's. Certainly, her pattern of strengths and weaknesses has remained unchanged across this interval.

> There is absolutely no indication of serious change/decline in her general level of intelligence. Her general level of intelligence is in the upper average range as it always has been. She also has had areas of considerable strength and areas of relative weakness evident across this long time span with the pattern remaining unchanged. Auditory verbal learning and memory remain areas of excellence whereas speed of processing complex visual information, hand-eye coordination, and her ability to learn briefly presented complex visual information are areas of weakness and in some instances mild impairment. Certainly, these areas of relative weakness may be compromised further during periods of poor diabetic control. .. [I]t is important to note that whatever the etiology her problems have remained stable across time and she has developed compensatory strategies which at least in some vocational settings reportedly have allowed her to be successful.
>
> I would encourage her again to seek employment in the types of jobs in which she knows she has been successful in the past. She should anticipate that she will need the same types of accommodations that have been necessary in the past including the ability to have information repeated to her and at times the need to work somewhat more slowly than others of her age and general capability level. Should her diabetes again become unstable, her ability to perform a given set of job requirements and her mental status may change/decline. This, of course, cannot be predicted in advance. Chronic, poorly controlled diabetes can lead to the development of additional neuropsychological dysfunction over long periods of time.

Dr. Woodard did not render an opinion as to complainant's ability to satisfactorily perform the duties of her ARC 3 position with or without accommodation.

30. Due to perceived inconsistencies between the conclusions of Dr. Merrick and Dr. Woodard, respondent decided to obtain a third IME. Harper requested that the Wisconsin Neuropsychologic Association recommend an expert to conduct this examination, and Thomas Hammeke, Ph.D., the head of the neuropsychology department of the Medical College of Wisconsin in Milwaukee, was recommended to her. Complainant continued on unpaid administrative leave during this period of time.

31. Dr. Hammeke examined complainant, and summarized his conclusions on February 22, 1999, as follows, in relevant part:

> Neuropsychological testing suggests significant impairments in information processing speed, nonverbal memory, visual scanning and sequencing. In addition, less significant deficits are apparent in select

> areas of visual-spatial reasoning and working memory skills. These neurocognitive deficits are accompanied by deficits in tactile-perceptual abilities and impaired fine motor coordination, with left-hand motor functions being disproportionately impaired relative to right. In contrast, verbal spontaneity, verbal memory, confrontation naming and select visual-perceptual functions (line angle discrimination) appear well-preserved. Overall, this profile of neuropsychological performance suggests bilateral cerebral involvement with likely greater subcortical and nondominant hemisphere contributions. In the context of Type 1 diabetes, small vessel disease is suggested. The patient's report of many episodes of transient neurologic symptoms, further raised the question of ischemic disease. As previous evaluators have suggested, this would be best evaluated and differentiated from hypoglycemic episodes with a MRI scan.
>
> The current neuropsychological deficits are significant and would likely have a major impact on Ms. Russell's abilities to perform her job functions. Specifically, information-processing speed is markedly diminished and her error rate on visual tasks requiring scanning and vigilance is relatively high. Similarly, memory for nonverbal materials also is significantly impaired. I believe, these deficits collectively preclude her from successfully managing many of the essential duties of her job.

32. In a letter to complainant dated April 6, 1999, Sinikka McCabe, Administrator of respondent's Division of Supportive Living, stated as follows, as relevant here:

> Effective April 9, 1999, based on recent medical information from Drs. Thomas Hammeke and William Merrick, the Department of Health and Family Services will medically separate you from your position in the job classification of Administrative Rules Coordinator in the Bureau of Quality Assurance, Division of Supportive Living.
>
> According to the medical reports from Drs. Hammeke and Merrick, you can no longer perform the essential job functions of an Administrative Rules Coordinator. Both doctors indicate that you suffer significant neuropsychological deficits. Neither doctor identified an accommodation that would enable you to perform as an Administrative Rules Coordinator with this medical condition.
>
> Due to the permanent nature of your disability, the Employer placed you on a "transfer as an accommodation referral effort" in an attempt to find other jobs for you that would be commensurate with your disability.

33. It is not unusual for respondent to consider several medical evaluations in assessing an employee's ability to perform assigned duties and responsibilities.

34. Generally, respondent attempts to utilize a health care provider for an IME who is not affiliated with the employee's health maintenance organization (HMO). Exceptions are made based on location, availability, area of expertise, and reputation in the field. Both Dr. Merrick and Dr. Woodard were affiliated with complainant's HMO.

CONCLUSIONS OF LAW

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

2. Complainant has the burden to prove that she was discriminated against based on disability as alleged, except to the extent that respondent has the burden to show that it reasonably accommodated complainant's disability.

3. Complainant has failed to sustain her burden of proof. Respondent did sustain its burden of proof.

OPINION[C]

Disability Discrimination

The complainant in a disability discrimination case must show that: (1) he or she is an individual with a disability, within the meaning of §111.32(8), Stats., and (2) the employer took one of the actions enumerated in §111.322(1), Stats. on the basis of complainant's disability. Once the employee has met the first two showings, the employer must show either that a reasonable accommodation would impose a "hardship" within the meaning of §111.34(1)(b), Stats., or that, even with a reasonable accommodation, the employee cannot "adequately undertake the job-related responsibilities" within the meaning of §111.34(2)(a), Stats. *Target Stores v. LIRC*, 217 Wis. 2d 1, 9-10, 576 N.W.2d 545 (Ct. App. 1998)

[C] The Commission made certain substantive changes to this section of the Proposed Decision and Order. These changes relate primarily to the citation of additional authority for the conclusion that respondent satisfied its duty of accommodation in regard to Allegation (1) (see discussion on pages 17-21), and to changes to the discussion of Allegation (3) (see discussion on pages 24-25).

Here, it is not disputed that complainant is disabled within the meaning of the Fair Employment Act (FEA) due to her diabetes.

The next question then is whether respondent discriminated against complainant on the basis of disability in regard to any of the subject allegations. Respondent first argues in this regard that the actions which form the basis for allegations 1-5 do not constitute adverse employment actions. In order to prevail on a claim of discrimination or retaliation under the FEA, a complainant is required to show that he or she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97. In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment." The applicable standard, if the subject action is not one of those named in this statutory section, is whether the action resulted in any materially adverse change in complainant's employment status. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2. Generally, the Seventh Circuit Court of Appeals has not required that an action be an easily quantifiable one such as a termination or reduction in pay in order to be considered adverse (*Collins v. State of Illinois,* 830 F.2d 692, 703, 44 FEP Cases 1549 (7th cir. 1987), but has concluded that not everything that makes an employee unhappy is an actionable adverse action (*Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996). In *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993), the court, in requiring that an actionable employment consequence be "materially adverse," stated:

> A material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Here, arguably, allegations 1 and 3 involve significantly diminished material responsibilities, allegation 5 the loss of pay, and allegation 2 the potential for termination. Moreover, even though an unfavorable performance evaluation, standing alone, does not constitute an adverse employment action, *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99; *Smart, supra*, the circumstances here show that the evaluation at issue in allegation 4 did not stand alone but ultimately led to the loss of pay when complainant was placed on unpaid administrative leave and to a termination. It is concluded, as a result, that the actions which form the basis for allegations 1-5 constitute adverse employment actions.

I. Disability Discrimination—Allegations 1, 2, 4, 5, and 6

There are two ways that discrimination on the basis of disability can occur. The first would occur if respondent's actions had been motivated by complainant's disability—i. e., if respondent deliberately discriminated against complainant due to her disability. The second would occur if respondent took action against complainant for performance reasons that were causally related to her handicap. *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92, aff'd Dane Co. Circ. Ct., *Jacobus v. Wis. Pers. Comm.*, 92 CV 1677, 1/11/93; *Thomas v. DOC*, 91-0161-PC-ER, 4/20/93. Here, the record shows that each of the subject actions resulted directly from the symptoms complainant experienced as the result of her diabetes, i.e., the unpredictability/lack of warning symptoms of her hypoglycemic reactions rendered complainant unable to drive, a key function of her Nursing Consultant 1 position (allegations 1 and 2); and cognitive deficiencies resulting from her diabetes interfered with her ability to satisfactorily perform her job responsibilities in her ARC 3 position (allegations 4 through 6). As a consequence, it is concluded, pursuant to the second theory stated above, that respondent discriminated against complainant on the basis of disability in regard to allegations 1, 2, 4, 5, and 6; and that complainant's disability was sufficiently related to her ability to adequately undertake the job-related responsibilities of her employment to constitute an affirmative defense under §111.34(2)(a), Stats.

The focus of this inquiry then turns to the issue of reasonable accommodation under the Wisconsin Fair Employment Act (FEA). Section 111.34(1)(b), Stats., makes it

an act of employment discrimination because of handicap to refuse "to reasonably accommodate an employe's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program." The questions of what is a reasonable accommodation, and whether a particular accommodation would impose a hardship, involve factual determinations that will vary from case to case. *See McMullen v. LIRC,* 148 Wis. 2d 270, 276-75, 434 N. W 2d 830 (Ct. App. 1988).

Allegation (1) Complainant was allegedly restricted from driving on work-related business in April, 1997

The record shows that respondent was justified in concluding that complainant was no longer able to drive safely, and complainant does not appear to challenge this conclusion. *See, Chandler and Maddox v. City of Dallas et al.*, 2 F.3d 1385, 2 ADA Cases 1326 (5th Cir. 1993), (insulin dependent diabetics present an unacceptable risk for employers and are thus not qualified, within the meaning of the Rehabilitation Act, to be employed in positions in which driving is an essential function); *Thoms v. ABF Freight System, Inc.*, 31 F.Supp. 2d 1119, (E.D. Wis. 1998); *Daugherty v. City of El Paso*, 56 F.3d 695, 4 ADA Cases 993 (5th Cir. 1995) (extending *Chandler* rationale to case brought pursuant to Americans with Disabilities Act).

Complainant argues, however, that respondent was required as a reasonable accommodation to hire and pay for a driver for her. Respondent contends that such an accommodation would not have been reasonable since it would have posed a hardship for respondent within the meaning of §111.34(1)(b), Stats. It is useful in resolving this question to review cases decided pursuant to the Americans with Disabilities Act (ADA) which has a hardship provision parallel to that set forth in the FEA. *See, Rogalski v. DHSS*, 93-0125-PC-ER, 6/22/95.

The ADA defines "undue hardship" as an action requiring significant difficulty or expense, 42 U.S.C. §12112(b)(5)(A). In applying this standard, it is appropriate to look not merely to the costs that the employer is asked to assume, but also the benefits to others that will result. Employers are not required to analyze these costs and benefits with mathematical precision, i.e., a common-sense balancing is all that is expected.*Stone*

v. City of Mount Vernon, 118 F.3d 92, 6 ADA Cases 1685 (2d Cir. 1997); *Borkowski v. Valley Central School District*, 63 F.3d 131, 4 ADA Cases 1264 (2d Cir. 1995); *Vande Zande v. State of Wis. Dept. of Administration, et al.*, 44 F.3d 538, 542-43, 3 ADA Cases 1636 (7th Cir. 1995) (accommodation obligation of the state as employer is subject to a balancing test notwithstanding the state's theoretically unlimited taxing power). The evidence of record shows that respondent employed a deliberative process, and concluded as a result of this process, that the cost of employing a driver, the fact that this cost had not been budgeted, and the absence of an authorized position in which to employ a driver rendered this accommodation option a hardship for respondent. There is no evidence of record to rebut this showing. Moreover, applying a common-sense approach to the facts under consideration here, (*see, Borkowski, supra),* it is concluded that hiring or employing a driver to accompany complainant in the performance of 30% of her duties would involve a significant cost to respondent disproportionate to the benefit. *See, Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 2001 U.S.App. Lexis 19511 (2d Cir. 2001) (no undue hardship created for employer when store clerk pays for own transportation to bank to deposit store receipts); *Hershey v. Praxair, Inc.*, 969 F.Supp. 429,9 ADA Cases 566 (S.D. Tex. 1997) ("The Court finds that it is not a reasonable accommodation to assign a Technician Helper to assist Plaintiff in the performance of the essential functions of his job. ... It is not reasonable to require an employer to have two people doing one person's job in the name of accommodation." 969 F. Supp. at 435); *Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (not a reasonable accommodation to require an employer to hire another employee to work alongside a disabled employee and to duplicate the disabled employee's responsibilities); *Rau v. UW-Milwaukee*, 85-0050-PC-ER, 2/5/87 (duty to accommodate does not include utilizing other employees to actually perform a job duty for a handicapped individual).

Complainant also argues that the driving requirement should have been removed from her position as a reasonable accommodation. Respondent contends that it was not required to remove this responsibility since it was an essential function of complainant's position. The record here shows that at least 30% of complainant's time was devoted to

duties which required her to travel alone, and that driving was specified in the position description as a necessary requirement of complainant's Nursing Consultant 1 position.

An employer is not required to remove essential functions of an employee's position as an accommodation of a disability. *See, e.g., Van Blaricom v. DHSS*, 93-0033-PC-ER, 5/2/96; *Conley v. DHSS,* 84-0067-PC-ER, 6/29/87; *Hershey, supra*, ("The ADA does not require an employer to eliminate or reallocate essential functions of a position in order to provide accommodation. *Bradley v. Univ. of Texas M.D. Anderson Cancer Center*, 3 F.3d 922, 925 (5th Cir. 1993), cert. denied, 510 U.S. 1119, 114 S. Ct. 1071, 127 L.Ed.2d 389 (1994)"; *Borkowski, supra*, ("It follows that an employer is not required to accommodate an individual with a disability by eliminating essential functions from the job." 63 F.3d at 140 [citations omitted]); *Thoms, supra*, (" .accommodations that consist of shifting essential duties to coworkers have been held unreasonable as a matter of law. *Stubbs v. Marc Ctr.*, 950 F.Supp. 889, 895 (C.D.Ill. 1997). An employer is not obligated to reallocate essential job functions themselves. *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 913 (7th Cir. 1996)." 31 F. Supp. 2d at 1129).

In *Hershey, supra*, the court concluded that essential functions are those functions that bear more than a marginal relationship to the job at issue, and, citing 29 C.F.R. §1630.2(n)(3), recited that evidence of whether a particular function is essential includes, but is not limited to: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past incumbents on the job; and/or (7) the current work experience of incumbents in similar jobs. *See, Chandler, supra* (court relied on employer's designation of position as primary driver to conclude that electrical repairer's responsibility for driving to work sites within the City of Dallas was essential job function); *Thoms, supra,* (consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, the description shall be considered evidence of the essential functions of the job.); *Holbrook*

v. City of Alpharette, Georgia, et al., 112 F.3d 1522, 6 ADA Cases 1409 (1997) (a detective's responsibility for driving to crime scenes held to be an essential function of job). In the instant case, the driving function was listed as a special requirement of the job on complainant's position description; a significant percentage of the surveys for which complainant was responsible required her to drive alone to remote work sites; and, like the employees in *Chandler* and *Holbrook, supra,* complainant was not employed primarily as a driver but driving enabled her to travel from one work site to another. It is concluded, as a result, that driving was an essential function of complainant's Nursing Consultant 1 position and respondent was not required to remove this function from her position as a reasonable accommodation.

Finally, transferring an employee with a disability to another position may be a reasonable accommodation. *Schmidt v. Methodist Hospital of Indiana*, 89 F.3d 342, 344 (7th Cir. 1996); *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95. In *Schmidt*, the court noted, in discussing the relevant accommodation provision of the ADA (42 U.S.C.§12112(b)(9)(A).n2), that, although neither the statute nor the regulations specify the circumstances under which an employer may reassign a disabled employee, EEOC's interpretive guidance, located in the appendix to the regulations, 29 C.F.R. app. §1630.2(o), provides that:

> Reassignment should be considered only when accommodation within the individual's current position would pose undue hardship. Employers should reassign the individual to an equivalent position, in terms of pay status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employer to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation.

See, Karbusicky v. City of Park Ridge, 950 F.Supp. 878, 6 ADA Cases 661 (N.D.Ill. 1997) (transferring an employee with a disability to another position may be a reasonable accommodation) In *Guice-Mills v. Derwinski*, 967 F.2d 794, 798 (7th Cir. 1992), the court held that an employer's offer of an alternative position that did not require a significant reduction in pay or benefits is a reasonable accommodation "virtually as a

matter of law." An employer is not required to offer an employee any accommodation she wishes. *See, Gile v. United Airlines*, 95 F.3d 492, 499 (7th Cir. 1996).

Under the facts of the present case, after concluding that complainant was no longer able to drive and that there was no reasonable accommodation for her in her Nursing Consultant 1 position, respondent transferred/demoted complainant to a position at the same pay rate which complainant admits she was interested in performing and which took advantage of both her background in nursing and in journalism. This qualifies as a reasonable accommodation pursuant to the standard enunciated above.

It is concluded that respondent met its burden of accommodation in regard to allegation (1).

Allegation (2) Complainant was allegedly informed in July, 1997 that she would be fired if she did not hire a driver. What the record shows actually occurred in this regard is that respondent advised complainant that it would permit her to hire a driver at her own expense and that, once complainant rejected this proposed accommodation, respondent pursued transfer as accommodation in lieu of a medical termination. Complainant's argument in regard to this allegation essentially parallels her argument relating to **allegation (1)** and the analysis of this argument will not be repeated here.

Allegation (4) Complainant's work performance was rated as "unacceptable" around April, 1998. The record does not contain a written evaluation of complainant's performance prepared in or around April of 1998. However, the record does show that complainant's supervisors had numerous meetings with her to discuss problems with her performance in the ARC 3 position, and these meetings and problems are well documented in the record. The preponderance of the medical evidence of record supports a conclusion that complainant's performance deficiencies were the result of permanent cognitive deficiencies symptomatic of her diabetes. Neither Dr. Merrick nor Dr. Hammeke suggest in their evaluations that there existed an accommodation which would enable complainant to satisfactorily perform the duties and responsibilities of the ARC 3 position In fact, the conclusions of their reports suggest instead that

complainant's significant cognitive deficiencies prevented her from performing the ARC 3 job or any job with similar intellectual demands with or without accommodation. Dr. Woodard's report is less clear in this regard but seems to indicate that complainant should focus her efforts on jobs in which she had been successful in the past, which would not include the ARC 3 position, and request/employ extra coaching/training and similar mechanisms to overcome her limitations. It should be noted that the accommodations suggested by Dr. Woodard and by complainant in her October 12, 1999, accommodation request, focusing primarily on extra coaching and training, had already been utilized by respondent in an effort to improve complainant's performance, but had not had that effect. It was reasonable, as a result, for respondent to have rejected further training and coaching of complainant as a viable accommodation (*See, Tews v. PSC*, 89-0150-PC-ER. 89-0141-PC-ER, 6/29/90), and to have concluded that transfer of complainant to a less intellectually demanding position or medical termination were the only reasonable remaining options.

Allegation (5) Complainant was placed on administrative leave on June 30, 1998, and required to have independent medical examinations. These actions resulted from respondent's reasonable and well documented conclusion (see above discussion) that complainant was not satisfactorily performing the duties and responsibilities of her ARC 3 position, and from respondent's extensive and well-documented but unsuccessful effort to improve complainant's performance through extra training, coaching, and feedback. These actions were an attempt by respondent to determine the medical basis for complainant's performance deficiencies, if there was one, and to determine if and how accommodation could be made if such a medical basis existed. It is not clear what complainant is arguing in regard to this allegation, but the record shows that, based on the totality of circumstances here, respondent's actions in this regard were reasonable.

Allegation (6) Complainant was allegedly informed on November 5, 1998, that she would be medically terminated if a 30-day job search was not successful.

By this date, respondent had received and reviewed the conclusions of the medical evaluations of complainant; had reviewed complainant's request for accommodation, including her request for transfer; and:

(1) had concluded, based on Dr. Hammeke's and Dr. Merrick's reports, that complainant's cognitive deficiencies rendered her unable to perform the level of responsibilities required of the classifications she listed, including Nursing Consultant 1,

(2) had concluded that further efforts to train, coach, and provide feedback to complainant would be ineffective in improving her performance in the ARC 3 position; and

(3) had offered complainant lower classified positions which she rejected.

The essence of complainant's argument in regard to this allegation appears to be that respondent should have relied instead on Dr. Woodard's report, and that Dr. Woodard's report supported a conclusion that, with proper coaching and training, complainant could have been successful in a Nursing Consultant or other equivalent position. In support, complainant argues that respondent did not follow its own typical practice when it utilized Dr. Merrick, a health care provider affiliated with complainant's HMO, to conduct the IME. However, the record shows that respondent makes exceptions to this practice based on considerations such as availability, expertise, and location, and that such considerations justified the selection of Dr. Merrick. It should also be noted that Dr. Hammeke was not affiliated with complainant's HMO and his assessment mirrored Dr. Merrick's.

Complainant also takes issue with the basis for certain of Dr. Merrick's and Dr. Hammeke's conclusions but there is insufficient expert testimony or other evidence in this record to refute such conclusions.

Complainant also argues that she was qualified to perform the duties and responsibilities of the classifications she specified in her accommodation request. These classifications represented positions requiring a level of independent judgment and analysis at least comparable to complainant's ARC 3 position. The preponderance of the medical evidence, represented here by the opinions of Dr. Merrick and Dr. Hammeke, support respondent's conclusion that complainant's permanent cognitive deficiencies

rendered her unable to successfully perform the duties and responsibilities of such positions.

Complainant also argues, in relation to allegations 4, 5, and 6, that, consistent with the decision in *Target Stores v. LIRC*, 217 Wis. 2d 18 (Ct. App. 1998), in a case where the employer knows the employee is trying a new treatment to deal with a disability, as complainant was, during this time, trying an insulin pump to control her hypoglycemic episodes, the employer is required as a reasonable accommodation to allow time to see if this new treatment works and make a difference. However, the record shows that permanent cognitive deficiencies, and her work performance problems directly resulting from these permanent deficiencies, not her hypoglycemic episodes, precipitated the actions by respondent under consideration here, and that the use of an insulin pump could have had no effect upon these permanent cognitive deficiencies. As a result, respondent was not required as a reasonable accommodation to wait until the testing period for complainant's insulin pump had expired.

Respondent has shown that it made reasonable accommodation of complainant's disability as relevant to allegations 1, 2, 4, 5, and 6.

II Disability Discrimination —Allegation (3)

Allegation (3) Complainant was removed from a lead survey assignment after experiencing an insulin reaction in August, 1997. The record actually shows that this action was taken in August or September of 1996, not August of 1997. In fact, in August of 1997, complainant was transferred/demoted to the ARC 3 position in lieu of medical termination. The record provides ample documentation of the deficiencies in complainant's work performance which precipitated her removal as the lead surveyor for the 1996 MMHI IOC survey and it is concluded, as a result, that this action did not result from intentional disability discrimination. In addition, the record does not show that respondent had any reason to be aware that a change in complainant's health condition was reponsible for her performance deficiencies in 1996. *See, Lane v. DOC*, 95-0070, 0096-PC-ER, 6/7/01, citing *Target Stores v. LIRC*, 217 Wis.2d 1, 15, 576 N.W.2d 545 (Ct. App. 1998) ("LIRC is interpreting the employer's obligation in light of the

information that the employer had and this is a reasonable construction and application of the statute.")

Complainant has failed to show, in regard to this allegation, that she was discriminated against on the basis of her disability under either discrimination model. That is, she did not show either that respondent's action was motivated by complainant's disability, or that respondent had any reason to believe that the performance problems which precipitated respondent's action were attributable to complainant's disability.

Moreover, even if the record did support a conclusion that complainant had been discriminated against by respondent on the basis of her disability in regard to her removal from the lead survey assignment, an affirmative defense is available to respondent. Specifically, if the Commission accepts complainant's argument that the cognitive deficiencies which interfered with her ability to perform the duties and responsibilities of the ARC 3 position had the same impact on her ability to perform the duties and responsibilities of the Nursing Consultant position, a higher level position which required a higher level of cognitive functioning, it would have to be concluded, as it was above, that the record shows that complainant's disability was sufficiently related to her ability to adequately undertake the job-related responsibilities of her employment, within the meaning of §111.34(2)(a), Stats., and that no reasonable accommodation was available.

Complainant has failed to satisfy her burden in regard to allegation 3).

ORDER

This complaint is dismissed.

Dated: December 11, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner

LRM:990023Cdec1.12

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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