

**MICHAEL M. REVELES, JR.,**  
*Complainant,*

v.

**Chairperson, UNIVERSITY OF  
WISCONSIN HOSPITAL AND CLINICS  
BOARD,**  
*Respondent.*

FINAL  
DECISION  
AND  
ORDER

Case No. 01-0004-PC-ER

This matter is before the Commission as a complaint of discrimination/retaliation. In its ruling dated August 30, 2002, the Commission established the following issue for hearing:

Whether there is probable cause to believe respondent discriminated against complainant on the basis of sex and/or national origin or ancestry or was retaliated against for engaging in fair employment activities and/or elder abuse reporting when he was terminated by respondent in 2001.

Respondent made a closing statement at the conclusion of the evidentiary hearing while complainant filed a post-hearing brief.<sup>A</sup>

The hearing was conducted before Kurt M. Stege, General Counsel, who served as the designated hearing examiner, on September 19, 2002. At the conclusion of the hearing, the examiner advised the parties of the procedures for obtaining copies of the tape recording of the hearing or of a transcript of the hearing and that in light of the examiner's workload, the parties stood a "much better chance" of getting a prompt decision if they did not choose to file a post-hearing brief. Respondent opted to make a closing argument at the conclusion of the hearing while the complainant requested, and was granted, 30 days after hearing to file a brief. (Transcript, pp. 160-1)

On or before September 24, 2002, complainant requested a copy of the magnetic tape recording of the hearing. The Commission made arrangements for copies to be

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<sup>A</sup> The remaining paragraphs in this section of the Commission's decision, until the section entitled "Findings of Fact," were all added to the proposed decision in order to reflect the complainant's subsequent motions.

made and sent to the complainant at his cost. On October 7, 2002, complainant filed a motion stating he had received the copies of the tapes on October 4<sup>th</sup> and that "this form is not satisfactory for the preparation of my brief." Complainant requested an extension of 90 days for the preparation of a hearing transcript and the submission of his brief. As reflected in a letter from the Commission to the parties on October 11<sup>th</sup>, the respondent did not take a position regarding complainant's request and the Commission granted the request to the extent that complainant was given 30 days from the date he received the completed transcript in which to file his brief. The transcript was completed on November 15<sup>th</sup> and complainant had until December 16 to file his post-hearing brief. Complainant filed his brief on December 16<sup>th</sup>. Respondent had until January 6, 2003, to file a response but chose not to file.

The designated hearing examiner issued a proposed decision and order in this matter on January 27, 2003. The cover letter to the proposed decision explained that "any objections with written arguments or with a request for oral argument" were due no later than February 26, 2003. On February 26, 2003, the Commission received, by fax, a "motion for oral argument" from the complainant. Complainant based his request solely on the following sentence: "The Personnel Commission is uninformed in 'Standing Orders' Protocol and thus has failed to make an appropriate decision regarding the Complainant's complaint." The Commission sought to contact the parties for the purpose of scheduling the oral argument and on March 25, 2003, complainant informed a member of the Commission's staff that he was unavailable for oral argument until after May 14, 2003. By letter dated April 1, 2003, the Commission scheduled the oral arguments for April 8, 2003, commencing at 2:30 p.m. The letter included the following language:

At the request of the complainant, the Commission has scheduled oral arguments in the above matter. Mr. Stege of this office spoke with both of you yesterday because of the time constraints imposed by the proposed demise<sup>B</sup> of the Commission on June 30<sup>th</sup> and by [respondent's attorney] Ms. Bruch's scheduled maternity leave commencing in mid-April.

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<sup>B</sup> Senate Bill 44, the 2003-05 biennial budget bill proposed by the Governor, calls for the elimination of the Personnel Commission and the transfer of its authority over complaints filed under

On April 3, 2003, the complainant filed by fax a "motion for postponement of oral argument [and] motion for the Commission to transfer *Reveles v. UWHCB* case." The complainant supported his motion solely by the following statements:

1. The transcript record of the hearing is flawed and will need to be corrected by the appropriate party.
2. The State of Wisconsin Personnel Commission will not be a governing party to the issue when corrected transcript will be completed.
3. Since the issue will not be resolved for several months, the Complainant asks that the complaint be heard by the Equal Rights Commission or appropriate party.

The Commission denied the complainant's motion by letter dated April 4, 2003, stating:

Mr. Reveles' request for postponement of oral argument, which we received by fax on April 3, 2003, is denied. This motion is based on a conclusory allegation that there is some kind of unspecified problem with the transcript, which is unsupported by any showing or any citation to specific issues. Obviously, there is no showing that the alleged problem would have a material effect on the Commission's decision.

On April 7, 2003, complainant filed a "motion for postponement of oral argument [and] motion for dismissal of the moderator for conflict of interest." The complainant supported his motion solely by the following statements:

1. The proposed date of April 8, 2003 did not give me adequate time to free my work schedule and thus I am unable to attend the meeting. My work schedule is set a month in advance and can be confirmed by talking with my Supervisor Rita Wizneski R.N. Telephone number 258-6884.
2. The commissions moderator, Mr. Kurt M Stege, employment with the hospital presents itself as a conflict of interest.
3. The jurisdiction of the Personnel Commission will end before adequate arguments can be heard. The Complainant asks that the complaint be heard by the Equal Rights Commission or appropriate party.

Later on April 7, 2003, the Commission faxed the following letter to the parties:

Earlier today, Mr. Reveles faxed a "motion for postponement of oral argument [and] motion for dismissal of the moderator for conflict of interest."

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the Wisconsin Fair Employment Act to the Equal Rights Division of the Department of Workforce Development.

I have spoken with Kurt Stege of the Commission staff regarding complainant's motions and the statements found in complainant's correspondence.

Complainant states that the oral argument date of April 8<sup>th</sup> "did not give me adequate time to free my work schedule." Mr. Stege indicates that he spoke with complainant on Monday, March 31, 2003, in order to schedule the argument and asked complainant specific questions about times he could be available before Ms. Bruchs' maternity leave. According to Mr. Stege, complainant stated he had classes in the morning and until approximately 12:30 on Monday, Tuesday and Wednesday but then refused to say anything more other than that he was completely unavailable until after the middle of May. According to Mr. Stege, he does not recall complainant making any mention of work constraints during this conversation. The April 8<sup>th</sup> date was selected by the Commission because it fit the complainant's schedule to the extent he was willing to divulge that schedule. There is no indication when complainant asked his supervisor for leave on April 8<sup>th</sup> and he has not proposed any alternative time that would fall within the other constraints that exist in this matter. Therefore, I deny complainant's motion for postponement of the oral argument scheduled for April 8<sup>th</sup>.

Complainant also states that Mr. Stege's "employment with the hospital presents itself as a conflict of interest." Mr. Stege is a full-time employee of the Personnel Commission. He has informed me that he is not employed by the respondent. Both he and I are unaware of any possible basis for complainant's assertion that Mr. Stege is employed with or by the respondent or by the University of Wisconsin Hospital or Clinics. Therefore, I deny the complainant's motion "for dismissal of the moderator for conflict of interest."

The oral argument will proceed as currently scheduled.

On April 8, 2003, at approximately 2:28 p.m., just minutes before the oral argument was scheduled to proceed,<sup>c</sup> the Commission received another fax from the complainant identified as a "motion for postponement of oral argument [and] motion for dismissal of the moderator for conflict of interest. The complainant supported his motion by reiterating the language in his motion filed on April 7<sup>th</sup> and by adding the following statements:

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<sup>c</sup> Complainant offered no explanation of why he was able to send a fax to the Commission at the time the oral argument was scheduled to begin but was unable to attend the oral argument at that time. Complainant did not appear for the argument.

1b. Regardless of Ms. Bruchs maternity leave, I indicated to Mr. Stege that I was not available in April for the oral argument due to Nursing (RN) school and work. Thus Mr. Stege is a liar and shows further prejudice with the treatment of the Complainant. I am requesting Mr. Stege's attorney number and I will be submitting a complaint with Attorney and Judiciary commission of the state regarding the handling of this matter by the personnel commission.

2b. Mr. Stege indicated that he worked as a Nursing Aid with the hospital one summer although he did not inform me it was with the University of Wisconsin when he disclosed this.

The complainant has consistently sought to delay a decision in this matter, most recently for reasons that fall under the category of "forum shopping." The Commission is of the opinion that fairness, efficiency and accuracy are all reasons why the Personnel Commission should seek to decide a case heard before it, rather than to seek to defer a decision to an agency that might succeed the Commission. For one thing, it would be easier for the Personnel Commission, rather than a successor agency, to gain information from the examiner regarding credibility determinations. Complainant has also failed to supply any viable reason why the Personnel Commission should delay issuing a decision until after June 30<sup>th</sup>. Therefore, the Commission denies the complainant's third request for a postponement of the oral argument and proceeds to decide this matter. The Commission also notes that the complainant's most recent filing inaccurately reflects the record in this matter. Mr. Stege, the designated hearing examiner, acknowledges that he worked for the summer of 1970 as a nursing assistant at what was then Madison General Hospital and is now Meriter Hospital. He disclosed this information to the parties at the commencement of the hearing and he noted that the hospital where he worked was *not* respondent's hospital:

HEARING EXAMINER: I guess I will also say that I did disclose to the parties that I worked many years ago for – briefly as a nursing assistant in a Madison hospital, not the Respondents by the way. And that's just a – background information as much as anything else.

The information provided by the examiner is totally inconsistent with any conflict of interest as alleged by the complainant. Therefore, the Commission denies complainant's motion "for dismissal of the moderator [sic] for conflict of interest."

### FINDINGS OF FACT

1. Complainant is male and of Mexican ancestry.

2. Respondent employed complainant beginning in 1999. Complainant began working in respondent's psychiatric ward, B6/5, early in 2000, as a Nursing Assistant.

3. At all times relevant to this proceeding, complainant's supervisor on B6/5 was Marie Radunzel, Clinical Nurse Manager.

4. By April of 2000, complainant's position was classified at the Nursing Assistant 3 level and his position description (Comp. Exh. 4) included the following language:

60% A. The Nursing Assistant 3 performs all tasks in the Nursing Assistant 1 and 2 position descriptions with the following additions:

20% B. Provide direct physical care to patients in selected situations where thorough knowledge of techniques is required.

The Nursing Assistant 1 position description includes the following:

25% A. Provide direct physical care, daily hygiene and comfort needs to patients in stable condition under the direction and close supervision of the RN.

11. Give evening and night care including oral hygiene and back rubs as per unit schedules.

25% B. Implement basic nursing procedures and treatments in accordance with hospital policies and procedures for patients in stable condition . . . .

5. *Back rub incident.* Complainant worked the night shift early in September of 2000. Vicki Rhodes, a nurse, was working the same shift. One night, Ms. Rhodes opened the door to the room of a young, female patient who was having difficulty sleeping. The door was slightly ajar, the lights in the patient's room were dim, and the patient was face-down in her bed, naked from the waist up and with both her hands under her forehead. Complainant was next to the bed and was startled when Ms. Rhodes entered the room. Ms. Rhodes immediately directed complainant to come out

of the room and complainant explained that he had been giving the patient a back rub. Ms. Rhodes told the complainant that it was not proper to give a back rub to a psychiatric patient of the opposite sex and that such conduct could be misinterpreted. Ms. Rhodes also reported the incident to Ms. Radunzel who also counseled the complainant to reinforce with him that such conduct was inappropriate and could be mis-interpreted. Ms. Radunzel did not formally discipline complainant because she felt it was conceivable that respondent's unwritten policy against giving back rubs to psychiatric patients (as compared to patients elsewhere in the hospital) had not been specifically covered in the standard orientation provided to complainant on the unit.

6. Back rubs are not scheduled for the patients on B6/5.

7. Ms. Radunzel completed complainant's performance evaluation and presented it to him on September 13, 2000. She awarded complainant scores averaging 2.3 on 8 separate "core abilities" where a score of 2 represented "meets criteria" and 3 represented "exceeds criteria." Ms. Radunzel did not reflect the back rub incident on performance evaluation because she had not had a conversation with complainant prior to the counseling.

8. Ms. Radunzel subsequently counseled complainant because of one or more complaints she received from staff about intimidating and aggressive conduct by complainant toward nurses working on the night shift.

9. During the relevant time period, complainant did not make a report of elder abuse to a state official.

10. *Patient confidentiality incident.* During the night shift for December 15/16, 2000, two paramedics transported a patient to B6/5. RN Mary Kratz was on duty that night. After she assisted with the admission in the patient's room, Ms. Kratz returned to the nurses' station and saw complainant conversing with the paramedics and showing them the chart of another patient (Richard) on the ward. When complainant saw Ms. Kratz, he quickly returned the chart to the chart rack. The patient's chart contained writings by Richard to his own chart that were evidence of his disordered thinking.

11. Ms. Kratz documented her observations in a message (Resp. Exh. 6) to Ms. Radunzel. The memo read, in part:

An admission was brought in Fri. [night] by paramedics. I came out of her room [after] settling her in bed and found Mike R, NA, showing the crazy pseudo-legal stuff Richard [] has written to the paramedics. I did not confront [complainant about] this.

12. *Patient contact incident.* On approximately the same date that Ms. Radunzel received Ms. Kratz's message, she also received a report from RN Donna Fero that a female patient had complained to Ms. Fero about being inappropriately touched by complainant.

13. Ms. Radunzel interviewed the patient who stated that after she had been admitted on Friday night, she fell asleep in her room and was startled by complainant who said he needed to take her vital signs. She stated she was clothed in her patient gown and, at complainant's request, sat on the edge of her bed. She stated that complainant rubbed her back as well as the sides of her upper body, making her very uncomfortable.

14. Upon receiving these complaints about complainant's conduct, respondent placed the complainant on paid leave and conducted an investigation.

15. By letter (Resp. Exh. 13), respondent terminated complainant's employment, effective January 23, 2001. The letter stated that complainant had disclosed confidential patient information when he had shown a patient's chart to the paramedics, and had interfered with, failed to exercise good judgment or been discourteous towards others when he had rubbed the back and sides of the female patient.

#### CONCLUSIONS OF LAW

1. These matters are properly before the Personnel Commission pursuant to §230.45(1)(b) and (j), Stats.

2. Complainant has the burden of establishing probable cause to believe that he was discriminated against on the basis of sex and/or national origin or ancestry or



was retaliated against for engaging in fair employment activities and/or elder abuse reporting when his employment was terminated.

3. Complainant has failed to sustain his burden.

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

#### OPINION

A complainant may establish a prima facie case of discrimination in a discharge case by showing that: (1) he is a member of a group protected under the FEA, (2) he was discharged, (3) he was qualified for the job, and (4) either he was replaced by someone not within the protected class or others not in the protected class were treated more favorably. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 173, 376 N.W.2d 372 (Ct. App. 1985), followed in *Harrison v. LIRC*, 211 Wis. 2d 681, 565 N.W.2d 572 (Ct. App. 1997), and in *Eleby v. LIRC*, 223 Wis. 2d 802, 589 N.W.2d 456 (Ct. App. 1998).

A complainant must establish three basic elements to prove a claim of retaliation: (1) that he opposed an unlawful employment practice; (2) that he was the object of adverse employment action; and (3) there is evidence that creates an inference<sup>D</sup> that the adverse employment action was caused by his opposition to the unlawful employment practice. *Cullom v. Brown*, 209 F.3d 1035 (7<sup>th</sup> Cir. 2000), citing *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7<sup>th</sup> Cir. 1990) in turn citing *Klein v. Trustees of Ind. Univ.*, 766 F.2d 275, 280 (7<sup>th</sup> Cir. 1985).

The initial burden of proof under the FEA 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, in turn, may 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),

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<sup>D</sup> The Commission has added language to this sentence in order to better reflect the applicable standard.

*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

This matter is before the Commission on the question of whether there is "probable cause" to believe that illegal discrimination/retaliation occurred, as defined in §PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard is not as rigorous as that required at a hearing on the merits.

Nevertheless, complainant failed to establish a prima facie case of retaliation because he failed to establish that he had engaged in any protected activity under either the Fair Employment Act (§111.322(2m), Stats.) or under the elder abuse provisions (§46.90, Stats.). As noted below, complainant's testimony that he reported the "mis-care" of a patient was not credible and there is no other conduct that he has identified that satisfies the statutory requirements for a protected activity.

Complainant also failed to establish any connection whatsoever between his sex or national origin/ancestry and the respondent's conduct. The evidence presented at hearing showed that respondent very reasonably believed that the complainant had engaged in gross misconduct on several occasions and that respondent decided to terminate complainant's employment solely because of this misconduct, rather than because of either his sex and/or his national origin or ancestry.

The Commission concludes that the complainant was not a credible witness. In contrast, respondent's witnesses were very believable. For example, complainant testified that he reported "mis-care" of patient "Dorothy" to both Ms. Radunzel and Mr. Myers, and possibly to RN Beth Strauss. Complainant failed to provide any documentation that he made a report. More importantly, Ms. Radunzel, Mr. Myers and Ms. Strauss all denied that complainant had made such a report and complainant's claim is inconsistent with the procedure that respondent would have had to follow if a report of improper care had been received.<sup>1</sup> Complainant also denied engaging in conduct that

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<sup>1</sup> Complainant testified that he spoke with Ms. Radunzel on this topic before she completed his performance review. If that testimony was true then Ms. Radunzel would have given complainant a positive performance evaluation despite knowing about the disclosure and that conclusion

other witnesses observed, even though the other witnesses had no motive to testify untruthfully. The Commission does not find credible complainant's denial that Ms. Radunzel told him not to engage in giving back rubs. Likewise, the Commission does not believe complainant's testimony that he did not show a patient's chart to ambulance drivers and that he did not touch a female patient inappropriately.

Complainant seemed to be arguing that back rubs should be given to patients in B6/5 or that the respondent's policy in this regard was not uniform to the extent that patients with psychiatric issues who were on other wards in the hospital might be given a back rub on occasion. These contentions have nothing to do with whether back rubs were permissible for B6/5 patients and the testimony from all witnesses other than complainant was clear and convincing that back rubs were not allowed for B6/5 patients.<sup>2</sup>

Complainant offered no evidence of different treatment by respondent of other employees who are outside of the complainant's protected categories. In his post-hearing brief, complainant suggested that he was discriminated against because he was discharged for an alleged confidentiality violation while Ms. Radunzel was not disciplined even though she "admitted to allowing" patients access to charts for other patients. Complainant is referring to Ms. Radunzel's testimony that certain patients were allowed to go behind the nurses' station to use a computer and that, sometimes, patient charts are accessed by staff nurses or physicians in the area behind the nurses' station. Transcript, pp. 12, 13. This testimony did not establish a violation of the respondent's confidentiality requirements, and is hardly conduct that is comparable to that of complainant as described in Finding 10.

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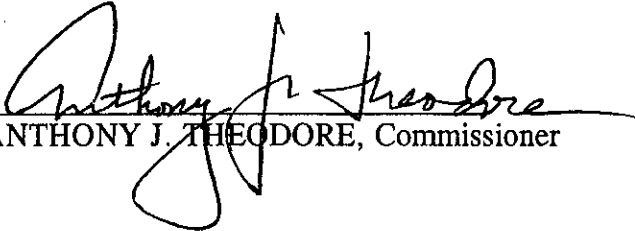
would be inconsistent with complainant's theory that Ms. Radunzel retaliated against complainant when she subsequently favored his discharge.

<sup>2</sup> This specific policy (rather than the language in the standard Nursing Assistant position description) dictated the conduct on B6/5.

ORDER

For the reasons noted in the prefatory language in this decision, the complainant's "motion for postponement of oral argument, motion for dismissal of the moderator for conflict of interest" filed on April 8, 2003, is denied. This matter is dismissed.

Dated: April 10, 2003 STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

KMS: 010004Cdec2

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 (1979).

Parties:

Michael M. Reveles, Jr.	UW Hospital and Clinics Board
913 High Street, Apt. #2	c/o Amy O. Bruchs
Madison, WI 53715	Michael Best & Friedrich
	PO Box 1806
	Madison, WI 53701-1806

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.

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