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JAMES R. YARBROUGH,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 INDUSTRY, LABOR & HUMAN,
 RELATIONS,
 Respondent.

Case No. 88-0103-PC-ER

* * * * *

FINAL
ORDER

After having reviewed the Proposed Decision and Order issued by the hearing examiner, having consulted with the hearing examiner, and having reviewed the record, the Commission adopts the Proposed Decision and Order with the following changes:

1. The paragraph which begins on page 17 and continues onto page 18 is deleted and the following paragraph substituted:

b. The "woman on the street" comment made by Mr. Sallstrom in 1986. (See Finding of Fact 13, above). Respondent argues that this comment is neutral on its face. However, in the context of racial stereotyping, the Commission concludes that this comment could be interpreted to be related to complainant's race. Respondent did acknowledge that this comment was offensive and, on this basis, investigated the incident and directed Mr. Sallstrom's supervisor to take corrective action. This corrective action took the form of counseling Mr. Sallstrom that such behavior was inappropriate and unacceptable and must not be repeated. This response by respondent to this incident was not perfunctory but was reasonable in view of the nature of the incident. The Commission concludes that this comment, although arguably related to complainant's race, and although offensive and inappropriate for the work place, was isolated in time from the other incident cited by complainant and that respondent took reasonable steps, in investigating complainant's allegations in

this regard and in taking corrective action, to prevent such an incident from being repeated.

2. The paragraph which begins on the bottom of page 18 and continues onto page 19 is deleted and the following paragraph substituted:

This aspect of complainant's charge of discrimination, i.e., that an abusive working environment had been created for complainant as a result of racial harassment by respondent, necessarily rests then on the two incidents discussed in a. and b. above. Complainant has failed to show that the first of these incidents was related to his race or color. Complainant has failed to show that these incidents were pervasive, i.e., two incidents during complainant's nine years of employment with respondent would not be considered pervasive, sustained, or numerous under the standards enunciated in Laber or North. Complainant has failed to show that the kicking action was non-trivial, severe, or opprobrious. Even if the "woman on the street" comment had been opprobrious, respondent took reasonable action upon learning of it to assure that such treatment of complainant would not be repeated. Complainant has clearly failed to show probable cause to believe that an abusive working environment had been created for complainant as a result of racial harassment by respondent, i.e., has failed to show probable cause to believe that he was discriminated against on the basis of his race in regard to his conditions of employment.

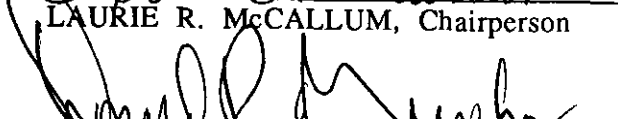
3. The paragraph which begins on the bottom of page 21 and continues onto page 22 is deleted and the following paragraph substituted:

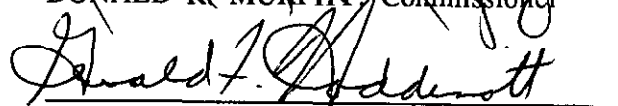
a. and b. These incidents were already discussed above (see pages 15-17, above) in the context of complainant's allegation of race discrimination in conditions of employment. The Commission has already concluded that these incidents did not involve race discrimination by respondent against complainant per se. The question here is whether they show pretext in the context of the written reprimand. Since both incidents are not only remote in time from each other and from the written reprimand but also have not been shown by complainant to have resulted in discrimination against him on the basis of his race, complainant has failed to demonstrate both that these incidents were part of a pattern or practice of race discrimination by respondent against him and that these incidents demonstrate pretext.

Dated: February 22, 1990

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

LRM:lrn

Parties:

James R. Yarbrough
2715 Homestead Road
Madison, WI 53711

Gerald Whitburn
Secretary, DILHR
P. O. Box 7946
Madison, WI 53707

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

JAMES R. YARBROUGH, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

INDUSTRY, LABOR & HUMAN, *

RELATIONS, *

Respondent. *

Case No. 88-0103-PC-ER *

* * * * *

PROPOSED
DECISION
AND
ORDER

Nature of the Case

This is a complaint of discrimination on the basis of race and/or color. The parties agreed to waive the investigation of this matter and that the following issue would govern this phase of the proceedings:

Whether there is probable cause to believe that the respondent discriminated against the complainant on the basis of race and/or color with regard to any or all of the following allegations/claims:

- a) May 6, 1988 written reprimand
- b) May 12, 1988 memo from Bill Komarek
- c) May 13, 1988 work assignment by Bill Komarek
- d) May 17, 1988 involuntary resignation/constructive discharge

A hearing was held before Laurie R. McCallum, Chairperson, on November 9, 1989, and the parties were permitted to file post-hearing briefs. The final brief was filed with the Commission on December 11, 1989.

Findings of Fact

1. In or around May of 1979, complainant was appointed to a position classified as a Personnel Specialist 3 in respondent DILHR's Bureau of

Personnel. Complainant's position functioned primarily as a classification analyst. Complainant worked under the direction of William Komarek, Chief, Classification Section, Bureau of Personnel. Complainant's supervisor was Duane Sallstrom, Director, Bureau of Personnel.

2. During complainant's first week of employment in this position, Mr. Sallstrom made a kicking motion with one of his feet in the direction of complainant's back.

3. On July 18, 1980, Mr. Sallstrom completed a written evaluation of complainant's performance in this position for the period from July of 1979 through June of 1980. This evaluation gave complainant's performance an overall evaluation of "satisfactory" (the middle rating on the 5-point scale) and stated, in pertinent part, that: "Although performance goals are generally met, work is inconsistent and frequently decisions are in error. Needs to develop a positive attitude about his job. Has been exposed to the necessary training to do the job, but fails to apply knowledge."

4. On July 9, 1981, Mr. Sallstrom completed an evaluation of complainant's performance in this position for the period from July 1, 1980, through June 30, 1981. This evaluation gave complainant's performance an overall evaluation of "satisfactory plus" using the same scale as described above, and stated, in pertinent part, that: "Overall performance has been satisfactory. Goals are usually met on time. However, performance of assigned work is inconsistent which requires close review of work. Interpersonal skills and enthusiasm are James' strengths."

5. In or around February of 1982, complainant was appointed to a Personnel Specialist 4 position in the Staffing Section of respondent DILHR's Bureau of Personnel. Complainant's position functioned as a staffing analyst

and the majority of the work consisted of exam development. Complainant's supervisor was Jack Lawton, Chief, Staffing Section. Mr. Lawton's supervisor was Mr. Sallstrom.

6. Each of the staffing analysts under Mr. Lawton's supervision, including complainant, was provided a completed "DILHR Personnel Staffing Workflow" form to follow in completing each exam development assignment. This completed form set forth a schedule for the completion of each aspect of the exam development process. Each staffing analyst, including complainant, was subject to the same requirements for completing assignments.

7. Mr. Lawton completed a written evaluation of complainant's performance in this staffing analyst position for the period of February, 1982, through June 30, 1982. This evaluation gave complainant's performance an overall evaluation of "satisfactory" using the same scale as described above, and stated, in pertinent part, "Because of the layoff activity, James (like the rest of the professionals and paraprofessionals was not assigned regular staffing duties (i.e., recruitment and testing)). At his request, James was given the task of developing and maintaining the DILHR layoff referral program instead of a more demanding role in the layoff team. James' overall performance in staffing was not up to the level he demonstrated earlier in the class section which resulted in his reclassification upward. I expect his performance to improve significantly with adequate training, greater involvement in staffing process and new MBO goals."

8. During 1982, complainant got less of a discretionary pay increase than certain other staffing analysts. Respondent attributed this to the fact that complainant had requested and performed a less demanding role on respondent's layoff team. Complainant requested this role because of his

experience and interest in job placement and wasn't aware at the time that it was regarded as a less demanding role than those performed by other members of respondent's layoff team.

9. During 1982, Mr. Sallstrom asked complainant if he would be willing to take a voluntary layoff. Mr. Sallstrom later told complainant that he was joking.

10. On July 6, 1983, Mr. Lawton completed a written evaluation of complainant's performance for the period from July of 1982 through June of 1983. This evaluation gave complainant's performance an overall evaluation of both "satisfactory" (the same rating as described above) and "good" (the second-highest rating on the 5-point scale described above), and stated, in pertinent part, "James' performance has improved substantially over the fiscal year. His recruitment and LTE placement work have been successful, with the LTE results recognized by many in the department (the permanent job recruitment has happened too recently to be evaluated). With more training in exam validation, I expect him to work quite independently within this coming year and to meet pre-established section goals for timeliness (not set at this time)."

11. Mr. Lawton completed a written evaluation of complainant's performance for the period of July of 1984 through July of 1985. This evaluation gave complainant's performance an overall evaluation of "met standards" (the middle rating on the 3-point scale), and stated, in pertinent part, "James has improved his performance on the relatively straight-forward exam development to the point where the timeliness of the exam development has been generally within expected bounds. This improvement in the speed has come somewhat at the expense of his co-workers who have had to adjust

their schedules to meet last minute efforts to meet deadlines. In order to increase his usefulness to the agency as a staffing consultant rather than an exam developer, James needs to gain a broader experience in staffing including cert processing, transfers, scoring, certification, layoff, recalls, reorganizations, discipline and grievances." A copy of this performance evaluation which also detailed the key responsibilities of complainant's position as well as performance expectations for the position was received by complainant and discussed with him by Mr. Lawton.

12. On June 20, 1986, Mr. Lawton completed a written evaluation of complainant's work performance for the period of July of 1985 through June of 1986. This evaluation gave complainant's work performance an overall evaluation of "did not meet standards" (the bottom rating on the 3-point scale described above), and stated, in pertinent part, "James has continued to have problems in meeting the exam development deadlines that are an integral part of this job. This has put unnecessary burdens on his co-workers by forcing them to make up the time so that DER deadlines are met. A similar criticism was made last year, but the situation appears to have gotten worse." The key responsibilities as well as the performance expectations listed for complainant's position on this written evaluation were identical to those listed on the previous year's evaluation.

13. Some time during 1986, complainant purchased a new home and a new Cadillac automobile. When he learned of this, Mr. Sallstrom remarked that complainant, "Must have a woman on the street."

14. In a memo dated June 31(sic), 1986, to Joe McClain, respondent's Affirmative Action Officer, complainant stated as follows, in pertinent part:

. . . Since I've worked in Personnel there has been a continuous atmosphere of racism, discrimination, and unfair treatment

perpetrated upon me by the Personnel Director, Duane Sallstrom. The most recent act is my yearly evaluation--which was prepared by my first line supervisor with the input and guidance of Mr. Sallstrom.

It is a matter of record that our working relationship has been a very difficult and strained affair. I was evaluated for the past year, as not meeting the standards--to my knowledge no standards exist. . . .

Never, during the past year, did my immediate supervisor, Jack Lawton, or Mr. Sallstrom, the Bureau Director inform me that I was not performing my duties or meeting the standards, which, I thought, is required when an employee is not doing an adequate job or performing as expected. . . .

From day one, in Personnel, I have experienced a racist and discriminatory attitude, and unequal treatment from Mr. Sallstrom. . . .

An example of the type of attitude and behavior I have to endure is Mr. Sallstrom's statement when I purchased a new house and automobile. He stated that, "you must have a woman on the streets." The first week of employment in Personnel Mr. Sallstrom lifted his foot as if to kick me in my derriere--a la Stepin Fetchit movie. Mr. Sallstrom has belittled me, in the presence of other employees in the Department. This mental and verbal harassment has frustrated my efforts to get my job done, and has created a negative work relationship. . . .

15. In response to complainant's memo to Mr. McClain, Toya McCosh, Executive Assistant to the Secretary, DILHR, requested that Howard Bernstein, Legal Counsel, DILHR, investigate complainant's allegations. In a memo to Ms. McCosh dated August 7, 1986, Mr. Bernstein concludes as follows, after summarizing the factual bases upon which his conclusions are based:

I believe there is an adequate factual basis for the critical comments on Mr. Yarbrough's annual evaluation. His evaluation of the year before had specifically discussed problems in meeting deadlines, although his overall performance in that area was found acceptable at that time. Although Mr. Yarbrough did not receive a specific warning during the July 1985 to June 1986 period that his performance in meeting deadlines had worsened, he was given specific deadlines for each exam to be developed and thus knew himself every time that he came in late with his work product. I do not think that the employer has to warn the employee of the exact degree of severity of the employer's possible response to the failure to meet performance standards; yet that appears to be the only knowledge that Mr. Yarbrough

lacked. In addition, there is no indication that Jack Lawton has been anything less than objective and non-discriminatory in applying the deadline standards to Mr. Yarbrough and the rest of his staff.

I cannot see how Dewey Sallstrom could expect Mr. Yarbrough to find the remark about "keeping a woman on the streets" to be inoffensive. A supervisor should foresee that a remark of that nature is highly likely to be offensive to the employee and should simply avoid making it.

I recommend that no change be made in Mr. Yarbrough's July 1985 to June 1986 performance evaluation, and that Dewey Sallstrom be counselled on avoiding inappropriate remarks and jokes to his employees. Our formal reply to Mr. Yarbrough should especially stress the importance the agency places on a working environment free from demeaning and offensive remarks.

Mr. Bernstein also concluded from his investigation that he was unable to substantiate complainant's allegation regarding Mr. Sallstrom's feigned kick of complainant.

16. Based on Mr. Bernstein's recommendation, Ms. McCosh advised complainant in a memo dated August 13, 1986, that there would be no change made in the subject evaluation but that the matter relating to Mr. Sallstrom's offensive comment to complainant would be referred to Mike Lovejoy, Mr. Sallstrom's supervisor, for corrective action.

17. In response to the referral of the matter relating to the offensive comment to him, Mr. Lovejoy did counsel Mr. Sallstrom in this regard.

18. Effective June 30, 1986, complainant transferred into a Personnel Specialist 4 position in the Classification Section, Bureau of Personnel. Complainant's position functioned primarily as a classification analyst and was supervised by Mr. Komarek. It was Mr. Komarek's practice to meet with the classification analysts under his supervision once or twice a week to discuss work assignments and work deadlines. It was also Mr. Komarek's practice to utilize written work planning forms detailing work assignments and work deadlines and to share these with the classification analysts under his

supervision. Mr. Komarek followed these practices while complainant was under his supervision as a classification analyst. All the classification analysts under Mr. Komarek's supervision were given comparable work assignments and work deadlines.

19. On October 28, 1986, Mr. Komarek completed a written evaluation of complainant's work performance for the period July 1, 1986, through September, 1986. This evaluation stated, in pertinent part, that "James' performance, in processing classification determinations timely, exceeds standards. However, the quality of classification determinations needs to be improved. More time should be spent reviewing the classification documentation to reduce the careless errors."

20. On December 22, 1986, Mr. Komarek completed a written evaluation of complainant's work performance for the period October 1, 1986, through December 19, 1986. The evaluation gave complainant's performance an overall evaluation of "met standards", the middle rating on the 3-point scale described above, and stated, in pertinent part, that "Since the first quarter evaluation with James, he has demonstrated improvement in his work performance. The careless errors he was prone to make have ceased and he has shown more independence of action. James still needs to have a better understanding of what determines the difference between classification levels before conducting field audits. This would enable him to know what information will be required and who should be interviewed. When preparing a classification justification, rather than listing a change or stating the position is complex, etc., explain how and/or why the position is complex or meets the position standards. James should organize his work assignments so that information can be readily available when requested."

21. On May 21, 1987, Mr. Komarek completed a written evaluation of complainant's work performance for the period December 19, 1986, through March 31, 1987. This evaluation gave complainant's performance an overall evaluation of "met standards" on the 3-point scale described above and stated, in pertinent part, that "Since the first and second quarter evaluations with James, he has again demonstrated improvement in his work performance. He has shown more independence in his classification actions. James should improve his understanding of what distinguishes the difference between classification levels before conducting field audits. When preparing classification justifications, he still needs to explain how and/or why the position is complex or meets the position standards rather than restating the position standard language or listing changes in the position. When free time is available, he should contact his supervisor for other assignments or review Personnel and Classification manuals, codes, procedures, etc., to become more familiar with Personnel operations."

22. On June 8, 1987, Mr. Komarek completed a written evaluation of complainant's work performance for the period July 1, 1986, through June 30, 1987. This evaluation gave complainant's performance an overall evaluation of "met standards" on the 3-point scale described above and stated, in pertinent part, that "Since James' transfer to the Classification Section on July 7, 1986, his level of performance has progressively increased. His fresh attitude and prior classification experience was key in his transition to classification assignments. However, he learned that many previous practices were no longer acceptable by DER or DILHR standards. Understanding of what distinguishes differences between classification levels should be expanded and honed. Additional time needs to be devoted to reviewing classification

manuals, codes, procedures, etc. James should organize his work and time to better allow him to work more efficiently."

23. On December 23, 1987, Mr. Komarek completed a written evaluation of complainant's work performance for the period July 1, 1987, through November 30, 1987. This evaluation gave complainant's performance an overall evaluation of "met standards" on the 3-point scale described above and stated, in pertinent part, that "James has basically met his standards while completing his assignments. However, James should review his work products more closely rather than hurrying to meet his time frames. More time would be available if he was better organized and nonwork-related office visits were reduced. James shown a genuine interest in the HRS. I encourage James to continue and expand this interest." This evaluation also indicated that complainant did not meet certain of the timeliness standards set for completion of his classification activities. Specifically, the performance expectations for the key responsibility designated as "Classification Activities" states as follows, in pertinent part: "Meets Standards--Process 90-93% of reclasses and reallocation requests within a three week period and 100% within a seven week period after assigned with a reject rate of 3% or less." The evaluation of complainant's performance of this key responsibility based on this standard indicated that 82.4% were timely; 5.9% were untimely; and 11.8% were still pending.

24. In a letter from Mr. Komarek dated May 6, 1988, complainant was advised that the letter constituted a written reprimand for failing to follow instructions, for failing to carry out a work assignment in an acceptable manner, and for neglecting job duties in relation to complainant's review of the classification of the position which functioned as the Chief of respondent's

General Clerical Section. This written reprimand was later withdrawn after complainant brought it to Mr. McClain's attention. The letter stated as follows, in pertinent part:

This letter is a written reprimand for your violations of the DILHR work rules pertaining to work performance. You failed to follow written instructions of supervisory authority, to carry out work assignments and additionally you neglected job duties by carelessly performing a job review.

On April 19, 1988, you conducted a review of the General Clerical Section Chief position and concluded that the position could not be approved at the requested level of Administrative Assistant 4-Supervisor.

During the morning of April 27, 1988, you were given written instructions to complete the review of the General Clerical Section Chief and to inform me of your classification decision before meeting with Meg Brown. Within several hours of receiving my written instructions, you completely reversed your previous classification determination and without informing or discussing the decision with me, you called Ms. Brown to inform her that you had approved the Administrative Assistant 4-Supervisor classification. Because Ms. Brown was not available, you left a message for her informing that you had approved the Administrative Assistant 4-Supervisor classification.

According to your comments, your reversal was based upon locating several position descriptions at the Administrative Assistant 4-Supervisor level in DER's position description files. When I asked to see a copy of the justification for the position, you said the position was at that level and that a justification wasn't provided for DER. When I asked to look at the copies of the position description, you stated, "The position descriptions are in DER's files. They could pull the position descriptions themselves if they want position comparisons."

25. In a handwritten note to complainant dated May 12, 1988, Mr.

Komarek stated as follows:

On 5/6/87 (sic) you were instructed to correct an error that was made when Dawn Beaty was reclassified before she performed at the Computer Operator 3 level for a minimum of six months by revising the effective date and by composing a letter to inform Ms. Beaty of the corrected action. (Because Gennette Banks brought this error to my attention, she was to receive a copy of the letter.) Remember, I was to review the letter.

What is the status of Beaty's corrected reclassification action? If this is already done, I didn't get a copy of the corrected notice. If it is not done, finish this by 5/13/87 (sic). The longer it is delayed, the greater the hardship will be on Ms. Beaty.

26. In a handwritten note to Mr. Komarek, complainant stated as follows:

This is to acknowledge the receipt of your memo inquiring about the status of the correction for the overpayment to Dawn Beaty, a Computer Operator 3 that was reclassified one month before the six month requirement. When you gave me the assignment you did not give me a deadline although I have been trying to get to it considering the work load that I'm currently handling it hasn't been easy. You have instructed me to have it done by tomorrow. As you are well aware, tomorrow is Friday and it may be difficult because I will need to deal with other individuals to get it done. However, I will do my best, but I can't guarantee that it will be complete tomorrow. Note: I received your memo at 3:45 p.m. on 5-12-88.

27. The work which Mr. Komarek required complainant to complete in his note of May 12, 1988, required approximately a half hour's time. It was not an unusual assignment or an unusual deadline for Mr. Komarek to require of a subordinate classification analyst.

28. In a memo to complainant dated May 13, 1988, Mr. Komarek stated as follows:

Beginning 5/16/88 and through 6/17/88, the assignments that you will be responsible for completing are:

1. Linda Hendrickson - reclass
2. Bonnie Campbell - reclass
3. Jacqueline Hubbard - reclass
4. Beatrice Dunning - reclass
5. Connie Hultman - reclass
6. Dorothy White - reclass
7. General Accounting Reorganization

All of the above assignments are to be completed by 6/17/88.

The number one priority among these assignments is the General Accounting Reorganization. On 5/16/88 at 8:30 a.m. you are to meet with me for further instructions.

Until these assignments are completed, vacation, personal holiday or Saturday/legal holiday time will not be approved for you. I expect you to be at work on 5/16/88 at your scheduled time. Any absence on Monday would not be in an authorized pay status.

29. The earliest of the above reclass assignments was originally given to complainant in late March (on or around March 29) of 1988 and the latest in early May (on or around May 2) of 1988.

30. The above reorganization assignment was later assigned to a different classification analyst and was completed in approximately 40-45 work hours.

31. During this same period of time, Mr. Komarek and Mr. Sallstrom were finalizing plans to change complainant's assignment from that of classification analyst to that of special assistant to Mr. Sallstrom.

32. In a memo to Mr. Komarek dated May 17, 1988, complainant stated as follows:

This is an official letter of resignation and two week notice of termination of my employment with DILHR, effective May 19, 1988. My last day of work will be June 2, 1988. I am resigning because of harassment and discriminatory treatment that I have been subjected to by my supervisor William F. Komarek, and DILHR Personnel Director, Duane Sallstrom.

33. In a letter to complainant dated May 17, 1988, Mr. Komarek stated as follows:

Your June 2, 1988, resignation is accepted.

Since you have not seen fit to discuss your allegation of harassment and discrimination with me and I am not aware of any grievances that you may have filed, I cannot respond to your statement concerning your treatment as stated in your letter of May 17.

I wish you success in your future employment activities.

34. Mr. Sallstrom is a very demanding supervisor and a "stickler for detail." This characterization applies to his supervision of all his subordinates.

On more than one occasion, his supervisors had counseled him regarding what they felt was inappropriate office deportment, e.g, offensive jokes, and counseled him to work on improving his personal interactions with other staff. This deportment and these interactions were not restricted to his relationship with any one employee or a small group of employees but generally to those employees with whom he came in contact.

35. On June 10, 1988, complainant filed the subject charge of discrimination with the Commission.

36. Complainant is black.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and 111.33(2), Stats.
2. The respondent is an employer within the meaning of §111.32(3), Stats.
3. The complainant has the burden to prove that probable cause exists to believe that respondent discriminated against him on the basis of his race and/or color as alleged.
4. Complainant has failed to sustain this burden.
5. There is no probable cause to believe that complainant was discriminated against as alleged.

Decision

Probable cause is defined in §PC 1.02(16), Wis. Adm. Code, as a reasonable ground for belief, supported by facts and circumstances, strong enough in themselves to warrant a prudent person to believe that discrimination has been or is being committed. Although the Commission recognizes that the burden on a complainant to show probable cause is not as rigorous as the burden to prove discrimination, it is useful in the context of a probable cause proceeding such as the instant one to utilize the analytical frameworks and guidance provided by decisions on the merits in discrimination cases to assist the Commission in reaching a decision on probable cause. The Commission will follow this course in reaching a decision here on probable cause.

Some of the incidents described and discussed in this decision occurred more than 300 days prior to June 10, 1988, the date on which the subject charge of discrimination was filed with the Commission. Complainant argues in favor of their consideration by the Commission by alleging that they form part of a pattern or practice of discrimination against him by respondent. Although it is certainly not clear that this argument by complainant would prevail if respondent had objected to the receipt of evidence relating to these incidents into the record or to the consideration of this evidence by the Commission, in the absence of any such objection by the respondent, this evidence will be considered by the Commission in reaching this decision.

Conditions of Employment

Section 111.322, Stats., provides in pertinent part that " . . . it is an act of employment discrimination to do any of the following: (1) . . . to discriminate against any individual in . . . terms, conditions or privileges of employment . . .

because of any basis enumerated in §111.321." Two of the bases enumerated in §111.321, Stats., are race and color and, therefore, respondent is prohibited from discriminating against complainant on the basis of his race and/or color in regard to his "conditions of employment."

The Commission, in its decision in Laber v. UW-Milwaukee, Case No. 81-PC-ER-143 (11/28/84), specified the two conditions which must be present in order for the Commission to find that this prohibition against discrimination in conditions of employment in a context similar to the one under consideration in the instant case had been violated: (1) the incidents of discriminatory harassment must be sustained, i.e., numerous and pervasive; and non-trivial, i.e., opprobrious or severe; and (2) the employer failed to take reasonable steps to redress the injury resulting from the harassment or to prevent further harassment. This approach was recently sustained by the 7th Circuit Court of Appeals in the context of a race discrimination claim brought under Title VII in the case of North v. Madison Area Association for Retarded Citizens, 844 F. 2d 401, 46 FEP 943 (7th Cir., 1988). The Court in North stated that "for racial harassment to be actionable, it must be so severe and pervasive as to alter the conditions of employment and create an abusive working environment" and concluded that two or three racial slurs made by North's co-workers and supervisor over a period of ten years were not sufficient to show that an abusive working environment had been created for North.

Using this framework, let us now examine the incidents cited by complainant which would be cognizable in determining whether an abusive work environment had been created for complainant as a result of racial harassment by respondent:

a. The kicking action by Mr. Sallstrom in or around May of 1979. (See Finding of Fact 2, above). On its face, this incident is racially neutral. Although complainant tries to characterize this as a racially discriminatory action on its face by comparing it to actions taken in movies featuring a "Stepin Fetchit" character, complainant failed to show that such a kicking action, standing alone, has been limited exclusively or primarily to movies featuring this character or has been directed exclusively or primarily at persons of a particular race or color and the Commission has no independent basis for reaching such a conclusion. In addition, the complainant has failed to show that this action was taken because of his race or that he was singled out for treatment of this kind by Mr. Sallstrom because of his race. In fact, the record reflects that Mr. Sallstrom on occasion directed inappropriate and unprofessional actions or comments at other subordinates, including white subordinates. Finally, this incident occurred in 1979, seven years prior to the next incident cited by complainant in support of his claim of racial harassment. The Commission does not find this action to be related to complainant's race or, even if it were, to be severe or opprobrious. The Commission does find this incident to be isolated in time from the other incident cited by complainant.

b. The "woman on the street" comment made by Mr. Sallstrom in 1986. (See Finding of Fact 13, above). On its face, this comment is racially neutral. Complainant has failed to show that the purveyors of prostitution are exclusively or primarily of one race or one color and the Commission has no independent basis for reaching such a conclusion. In addition, the complainant has failed to show that Mr. Sallstrom made this comment because of complainant's race or that complainant was singled out for a comment of

this nature by Mr. Sallstrom because of his race. In fact, the record shows that Mr. Sallstrom on occasion directed inappropriate and unprofessional actions or comments at other subordinates, including white subordinates. It is undisputed by the parties, however, that this comment was offensive. Based on this, respondent investigated the incident and directed Mr. Sallstrom's supervisor to take corrective action. This corrective action took the form of counseling Mr. Sallstrom that such behavior was inappropriate and unacceptable and must not be repeated. This response by respondent to this incident was not perfunctory but was reasonable in view of the nature of the incident. The Commission concludes that this comment, although offensive and inappropriate for the work place, was not made by Mr. Sallstrom as a result of complainant's race and/or color and was isolated in time from the other incident cited by complainant. In addition, the Commission concludes that respondent took reasonable steps, in investigating complainant's allegations in this regard and in taking corrective action, to prevent such an incident from being repeated.

The other incidents cited by complainant are not properly cognizable in determining whether an abusive working environment had been created for complainant as a result of racial harassment by respondent and will be reviewed below in the context of complainant's allegation of disparate treatment.

This aspect of complainant's charge of discrimination, i.e., that an abusive working environment had been created for complainant as a result of racial harassment by respondent, necessarily rests then on the two incidents discussed in a. and b. above. Complainant has failed to show that either of these incidents was related to his race or color. Complainant has failed to show

that these incidents were pervasive, i.e., two incidents during complainant's nine years of employment with respondent would not be considered pervasive, sustained, or numerous under the standards enunciated in Laber or North. Complainant has failed to show that the kicking action was non-trivial, severe, or opprobrious. Although the "woman on the street" comment was certainly offensive, the Commission does not conclude that it would reach the level of "opprobrious" or "severe." Even if such comment had been related to complainant's race and had been opprobrious, respondent took reasonable action upon learning of it to assure that such treatment of complainant would not be repeated. Complainant has clearly failed to show probable cause to believe that an abusive working environment had been created for complainant as a result of racial harassment by respondent, i.e., has failed to show probable to believe that he was discriminated against on the basis of his race in regard to his conditions of employment.

Disparate Treatment

In analyzing a claim of disparate treatment, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. V. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination. The issue governing this proceeding sets forth four transactions through which complainant alleges respondent discriminated

against him on the basis of his race and/or color. We will analyze each of these four transactions using the McDonnell-Douglas framework.

Written Reprimand

As described in Finding of Fact 24, above, Mr. Komarek, in a letter dated May 6, 1988, issued a written reprimand to complainant which was later withdrawn. Complainant has established a prima facie case of discrimination in regard to this transaction. Because complainant is black, he is a member of a group protected by the Fair Employment Act (FEA). Respondent argues that, because the written reprimand was later withdrawn, that no adverse personnel action was taken against complainant. The Commission disagrees. The withdrawal certainly reduced the impact of the reprimand on complainant. However, it did not and could not erase the impact the reprimand had on complainant, e.g., the stress this may have caused complainant, the embarrassment this may have caused complainant, the damage to complainant's reputation this may have caused, etc. Finally, the procedure followed in issuing the reprimand and then withdrawing it after complainant brought it to the attention of Mr. McClain could create an inference of discrimination.

Respondent attempted to rebut this prima facie case by explaining that the written reprimand was withdrawn after further consideration by Mr. Komarek and after review of the action by his superiors. On its face, this reason is legitimate and non-discriminatory. A reversal of a decision by a superior does not necessarily mean that the initial decision was either in error or discriminatory.

The burden then shifts to complainant to show that this reason is pretextual. Complainant takes two approaches to satisfying this burden. First, by viewing the reprimand in isolation and then by viewing it in the context of what complainant argues had been a pattern and practice of discriminatory treatment.

Viewing the written reprimand in isolation, complainant would have to show that the written reprimand was not warranted either by showing that the incident which formed the basis for the written reprimand had not occurred as respondent represented that it had or by showing that, even if it had, that it hadn't merited a reprimand, e.g., wasn't a violation of agency policies or procedures, was inconsistent with discipline imposed on other employees, etc. The only evidence introduced by complainant in this regard is that he had a feeling that Mr. Komarek wanted him to change his original decision that Ms. Brown's position should be classified at the Administrative Assistant 4-Supervisor level. This evidence does show why complainant reversed his original decision but does not explain why complainant failed to follow Mr. Komarek's instructions to meet with him prior to contacting Ms. Brown or why complainant failed to provide, upon Mr. Komarek's request, a justification for his decision or copies of position descriptions he had referenced in explaining his decision to Mr. Komarek. Complainant failed to introduce any evidence relating to whether the actions for which he was reprimanded merited a reprimand. Complainant has failed to show pretext in this regard.

Complainant cites the following incidents prior to his receipt of the written reprimand which he argues demonstrate a pattern and practice by respondent of discriminating against complainant on the basis of his race:

a. and b. These incidents were already discussed above (see pages 15-17, above) in the context of complainant's allegation of race discrimination in conditions of employment. The Commission has already concluded that these incidents did not involve race discrimination by respondent against complainant per se. The question here is whether they show pretext in the context of the written reprimand. Since both incidents are not only remote in time from each other and from the written reprimand but also have not been shown by complainant to be related to his race or to be different in nature and frequency from the actions or comments that Mr. Sallstrom directed at other subordinate employees, including white employees, complainant has failed to demonstrate both that these incidents were part of a pattern or practice of race discrimination by respondent against him and that these incidents demonstrate pretext.

c. Complainant argues that the fact that he never got more than a satisfactory performance evaluation rating from Mr. Sallstrom reinforces his position that there was a pattern or practice of race discrimination against him by respondent and that this demonstrates pretext in the context of the written reprimand. First of all, Mr. Komarek imposed the written reprimand, not Mr. Sallstrom. The record does indicate, however, that Mr. Sallstrom was involved in the withdrawal of the written reprimand. Second, complainant has failed to show that his performance merited higher evaluation ratings from Mr. Sallstrom. The evaluations of complainant's work performance completed by Mr. Sallstrom are consistent with the evaluations completed by complainant's two other supervisors; complainant has failed to show that his work performance was not as Mr. Sallstrom represented it to be in the evaluations he completed; and complainant has failed to show that white

employees who performed similarly to complainant received higher performance evaluation ratings. Complainant has failed to show that this incident was part of a pattern or practice of race discrimination against him and has failed to show pretext in this regard.

d. Complainant argues that the fact that he got less of a discretionary pay increase than certain other staffing analysts during the period of layoffs in 1982 reinforces his position that there was a pattern or practice of race discrimination by respondent against him and demonstrates pretext in regard to the written reprimand. First of all, the decision to recommend that complainant get less of a discretionary pay increase than certain other staffing analysts during 1982 was made by Mr. Lawton, whereas the written reprimand was imposed by Mr. Komarek. Second, complainant has failed to show that he deserved to get more of a discretionary pay increase, i.e., has failed to show that the assignment he requested during this period of time was actually as complex or more complex than the assignments of those staffing analysts who received a higher discretionary pay increase than he; has failed to show that his performance during this period of time was not as respondent represented it to be; and has failed to show that staffing analysts with work performances equivalent to or not as good as complainant's or with assignments equivalent to or less complex than complainant's received more of an increase than complainant. As a result, complainant has failed to show that this incident was part of a pattern or practice of race discrimination against him and has failed to show pretext in this regard.

e. Complainant argues that Mr. Sallstrom's inquiry regarding complainant's willingness to take a voluntary layoff (see Finding of Fact 9, above) was part of a pattern or practice of race discrimination against him and

demonstrates pretext in regard to the written reprimand. First of all, Mr. Sallstrom did not impose the written reprimand. The record shows, in fact, that he was only involved in withdrawing the reprimand. Second, complainant has failed to show that a similar request was not made of other white employees or that such a request is unusual during a period of layoff. Complainant has failed to show that this incident was part of a pattern or practice of race discrimination against him and has failed to show pretext in this regard.

f. Complainant argues that the unsatisfactory performance evaluation he received from Mr. Lawton was part of a pattern or practice of race discrimination against him and demonstrates pretext in regard to the written reprimand. First of all, Mr. Lawton did not impose the written reprimand, Mr. Komarek did. The record does not show that Mr. Lawton was involved in any way in imposing or withdrawing the written reprimand. Second, complainant has failed to show that his work performance was not as respondent represented it to be in the unsatisfactory evaluation or that similarly performing white employees got higher evaluation ratings. Third, complainant's basis for challenging the evaluation was that he was not aware of the performance standards. However, the relevant performance standards were the same as for the previous year's evaluation and the deficiencies cited were consistent with those cited for needing improvement in the previous year's evaluation. Complainant has failed to show that this incident formed part of a pattern or practice of race discrimination against complainant and has failed to demonstrate pretext in this regard.

Complainant has failed to show that probable cause exists to believe that respondent discriminated against complainant in regard to the written reprimand.

May 12, 1988 memo from Mr. Komarek

As described in Finding of Fact 25, above, Mr. Komarek instructed complainant to complete a certain assignment on or before May 13, 1988. The first question is whether complainant has established a prima facie case in this regard. He has established that he is black and, as such, a member of a group protected by the FEA. He has also established in a broad sense that an adverse personnel was taken against him by respondent. However, complainant has failed to show that the incident raises an inference of race discrimination against complainant. The record shows that the assignment was equivalent to those given other staffing analysts; and that the deadline for its completion was reasonable given the facts that complainant had had the assignment since May 6, 1988, and that the assignment would take only one-half hour to complete. If complainant had established a prima facie case, the burden would shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. In this regard, respondent has established that time was of the essence since delays in completing the assignment increased the amount of money that Ms. Beaty would have to repay; that complainant had already had the assignment since May 6, 1988; and that the assignment would taken only one-half hour to complete. These reasons are clearly legitimate and non-discriminatory on their face. The burden then shifts to complainant to demonstrate pretext. Complainant alleges in this regard that such action by respondent was unusual for such a minor

issue. However, the record shows that the action was not unusual and that attention was required in order that further hardship for Ms. Beaty be avoided. Complainant also attempted to demonstrate pretext in this regard, as in regard to the written reprimand, by showing that this incident was part of a pattern or practice of race discrimination by respondent. Complainant relied upon the same incidents as relied upon in regard to the written reprimand in his attempt to show this pattern or practice. As discussed above, complainant failed to show that these incidents demonstrated a pattern or practice of race discrimination in regard to the written reprimand and the Commission adopts the same conclusion in regard to the May 12, 1988, assignment. The only additional incident which would be considered in the context of this assignment would be the reprimand itself and the complainant, as discussed above, has failed to show that the reprimand involved discrimination against complainant on the basis of his race and, thus, has failed to show that the reprimand was part of a pattern or practice of race discrimination against complainant. Complainant has failed to demonstrate pretext in regard to this assignment.

Complainant has failed to show that probable cause exists to believe that complainant was discriminated against on the basis of his race or color in regard to the May 12, 1988, memo from Mr. Komarek.

May 13, 1988 work assignment by Mr. Komarek

As described in Finding of Fact 28, above, Mr. Komarek, in a memo dated May 13, 1988, instructed complainant to complete certain assignments on or before June 17, 1988, and instructed complainant that he would not approve leave for complainant until such assignments were completed. The first

question is whether complainant has established a prima facie case in this regard. He has established that he is black and, as such, a member of a group protected by the FEA. He has also established, again in the broadest sense, that respondent took an adverse personnel action against him i.e., limited his ability to take leave until an assignment was completed. The incident could also be said to raise an inference of discrimination since it would appear unusual to so strictly limit an employee's flexibility to take leave in order until certain assignments were completed. Complainant has established a prima facie case in this regard.

The burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for its actions. Respondent has satisfied its burden by explaining that complainant had already had time to work on these assignments; that deadlines for some of these assignments had already passed; that similar assignments and deadlines were established for other employees, including white employees; that respondent wanted complainant to finish these assignments so that he could be appointed to a different position; and that the assignments could be completed by the deadline imposed.

The burden then shifts to complainant to demonstrate pretext. In this regard, complainant failed to show that the deadline was not reasonably attainable or that he had been singled out for this type of assignment, deadline, or limitation on leave. Once again, complainant argues that pretext is demonstrated by the pattern or practice of discrimination against him by respondent, citing the same incidents discussed above in the context of the written reprimand and the May 12, 1988, assignment, including such assignment itself. The Commission has already concluded that complainant has failed to show that these incidents were part of a pattern or practice of

race discrimination against complainant. Complainant has failed to demonstrate pretext in regard to the May 13, 1988, assignment and deadline.

Complainant has failed to show that probable cause exists to believe that complainant was discriminated against on the basis of his race or color in regard to the May 13, 1988, assignment and deadline.

Constructive Discharge

In order to establish a prima facie case of race discrimination in the context of an allegedly constructive discharge, complainant must show that he is a member of a class protected by the FEA, that he was qualified for the job that he was performing, that he was capable of performing this job satisfactorily, that he was constructively discharged, and that this discharge raised an inference of discrimination on the basis of race. [Johnson v. Bunny Bread, 646 F. Supp. 1250, 25 FEP Cases 1326 (8th Cir. 1981); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 45 FEP Cases 140 (2d Cir. 1987)]. Complainant has shown that, as a black, he is a member of a group protected by the FEA; that, as a result of his certification for and selection for his position, he was qualified for the position he held; and that, in view of the number of satisfactory performance evaluation ratings he received, he was capable of performing the duties and responsibilities of this position satisfactorily.

In order to show that he was constructively discharged, complainant would have to show that a reasonable person would have found the working conditions under which complainant was required to perform the duties and responsibilities of his position intolerable; that racially discriminatory conduct on the part of respondent created these intolerable working conditions; and that his resignation resulted from these intolerable working

conditions. [Bourque v. Powell Electrical Manufacturing Co., 671 F.2d 61, 22 FEP Cases 1191 (5th Cir. 1980); Brown v. Brienen, 722 F.2d 360 (7th Cir. 1983)]. The courts have interpreted the term "intolerable" to mean aggravated or extreme. The incidents cited by complainant in support of his position that he was constructively discharged are those incidents discussed as a. through f., above. Not only has the Commission already concluded that incidents a. and b. did not create an abusive working environment for complainant but also that none of these incidents involved racial discrimination against complainant by respondent. Complainant has clearly failed to show that he was constructively discharged and his complaint of discrimination in this regard must necessarily fail.

Complainant has failed to show that probable cause exists to believe that he was discriminated against on the basis of his race or color in regard to his resignation.

Order

This complaint is dismissed.

Dated: _____, 1990

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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