STATE OF WISCONSIN PERSONNEL COMMISSION

STEPHEN GETSINGER,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stevens Point),

Respondent.

Case No. 91-0140-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss on the bases of untimely filing (as to FEA discrimination) and for failure to state a claim (as to "whistleblower" retaliation). The parties have filed briefs and various supporting documents.

The general rules for deciding this kind of motion are:

> [T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
>
> ... A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.

Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89) (quoting Morgan v. Pa. Gen. Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979) (citations omitted)); affirmed, Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

This complaint was filed on September 19, 1991. It alleges that complainant was hired in 1988, by Assistant Chancellor Dr. Frederick Leafgren as Executive Director of the Student Enrichment and Retention Services at UW-SP. The complaint also states that it is complainant's "belief that he was hired by Dr. Leafgren based upon the mistaken belief that Dr. Getsinger was a homosexual." The complaint further alleges that Dr. Leafgren engaged in a course of sexual harassment and took "aggressive steps to obtain a sexual relationship" with him, and that after he failed to respond positively to these

a pattern of sexual harassment. It was only then, complainant asserts, that he reached the conclusion that he too had been sexually harassed.

The time for filing a complaint of FEA discrimination does not begin to run until the date that the facts that would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant. Sprenger v. UWGB, 85-0089-PC-ER (7/24/86) (citing Reeb v. Economic Opportunity Atlanta, 516 F. 2d 924, 11 FEP Cases 235, 241 (5th Cir. 1975)). Therefore, the question that must be answered on this motion is not when complainant reached the conclusion that he had been discriminated against, but when it would have been apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant. In addressing this issue, the Commission will assume as true the facts asserted by complainant, but will not accept unreasonable inferences from those facts or complainant's assertions of legal conclusions. Phillips v. DETF, supra.

Complainant refers generally in his complaint to "unwelcomed sexual advances, requests for sexual favors and other physical conduct and expressive behaviors of a sexual nature where submission to such conduct was made either explicitly or implicitly a term or condition of ... employment." In his deposition, complainant provided testimony about the details of these transactions.

Complainant alleges that in the course of certain purported business meetings with Dr. Leafgren in April of 1989, Dr. Leafgren made the statement that: "'I want to be more than just your boss. I have a lot of affection for you. I really like you. I'm interested in really wanting to be more than a boss. I want to be friends. I want to have a really close and intimate relationship with you.'" Tr., 20.[1] Complainant further testified that he "took it [the foregoing statement] to be a romantic overture," Tr., 22, and that Dr. Leafgren made these overtures on a number of other occasions: "Fred ... indicated to me at a number of different meetings with him that he was -- he wanted to be more than just my boss, that he wanted to be friends, intimates, associates at a deeper level than simply boss and worker." Tr., 24. Complainant further testified that at the time he found these comments to be "strange" but not "sexual in nature." Tr., 26.

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Complainant also testified that in April of 1989, Dr. Leafgren "asked me if I was attracted to one of my staff [Dale Christensen] and indicated to me that he didn't find him attractive." Tr., 22.

Complainant also testified that over the period of his employment, Dr. Leafgren hugged him "a number of different times ... I wouldn't say that they were friendly hugs or unfriendly hugs or that they were sexual hugs. They were hugs." Tr., 26.

Complainant also testified about an incident that occurred on or about September 12, 1989, when he met Dr. Leafgren for a lunch appointment and at Dr. Leafgren's behest went out to his house, which was six or seven miles out in the country, to pick something up. Complainant testified as follows:

> And we went in and he said, "Yeah, I need to go upstairs, would you like to come up to my bedroom?" And I remember standing there feeling -- I'm not going up to this guy's bedroom; and I said, no, not really. And so he started up the steps. And I said, I've been up there before, I've seen your bedroom. And he turned around on the stairway and said: "When were you ever in my bedroom?" And I said, well, when I was here, there was a party, and you walked me through the house and took me on a tour, because up there you have a chest that's very similar to the chest that I have. And then he said: "Well, are you sure you wouldn't want to come up here?" And I said, Fred, we have a lot of things to discuss, we have a lot of business to do, let's get on with it.

Tr., 28. Complainant testified with respect to this incident that: "I felt upset about it. It bothered me. I didn't like it." Tr., 29. He also testified that: "I did not consider it to be a sexual advance at the time. I blocked it out. At the time I don't know what I considered it. I felt confused, ashamed." Tr., 30.

Complainant testified that on November 21, 1989, when he met Dr. Leafgren for lunch he was presented with a letter from Dr. Leafgren advising that Mr. Christensen would not be employed beyond that academic year. Complainant testified that prior to this:

> I had some indication after Fred had indicated to me that he wasn't attracted to Dale and that he wouldn't want to sit with him or be with him and that he couldn't imagine ever going to somebody like that for counseling, and told me about his theory of hiring people, that he had to feel attracted to them and wanted to be with them and wanted to look forward to being with them. I felt I needed to do a formal performance appraisal on Dale to make sure that he would have any sort of a chance to be there....

Tr., 31. After complainant read the letter, he expressed his displeasure about the transaction to Dr. Leafgren:

> I ... said, Fred, this is extremely troubling to me, what's happening to Dale, I don't feel it's fair. You promised me when I went to work here that I would be able to make decisions about my staff, and that as you put it, I could run my shop. I don't think it's right. I think that Dale is doing a good job, and I am not sure I want to continue to work here under these circumstances, if you're going to violate what you told me as conditions of my working here.

Tr., 34-35. Then, according to complainant:

> At that time Fred Leafgren told me that he loved me, that he wanted me close to him, that he was attracted to me, that's why he had appointed me, that he looked forward to being with me, that he wanted to be close to me, that he did not want me to leave, that he enjoyed our Tuesday meetings because they gave him an opportunity to sit by me, to look at me, to be with me.

Tr., 30-31. Complainant testified at the time that he was "confused, upset, angry," Tr., 35, but did not consider Dr. Leafgren's statement to be a sexual overture. Complainant further testified that his "understanding [of why Dr. Christensen was terminated] was because Fred wasn't attracted to him ... Fred Leafgren never made any comment to me substantially criticizing Dale Christiansen's [sic] work performance in any way, shape, or form." Tr., 37-38.

Complainant also mentioned a statement by Dr. Leafgren that occurred on March 6, 1990, in the context of a discussion of morale problems among female staff, but he testified that this was really not a sexual advance toward him.

Finally, complainant testified that after Mr. Kuri came forward with the story of his sexual relationship with, and sexual harassment by, Dr. Leafgren, complainant realized that Dr. Leafgren had been sexually harassing him:

> As I listened to Cregg's story, and as I started to go back and think about the things that had happened to me, it became very clear to me what Dr. Leafgren had been up to. That I had been working overtime in my mind to reinterpret his behavior and comments to be other than what they were. So, at the time I had had all my key defenses going to not see what was happening right out there and that I had been lying to myself.

Tr., 53.

Based on what complainant asserts Dr. Leafgren did and said, there can be no question but that a reasonable person similarly situated to complainant would have been aware no later than November 1989, that Dr. Leafgren was interested in becoming sexually involved with him, and that Dr. Leafgren had

no legitimate business reason for effectively terminating Dr. Christensen's employment. No reasonably prudent person could fail to interpret Dr. Leafgren's repeated invitations to accompany him to his bedroom, his statement about hiring people who were attractive to him, his statement that: "he loved me, that he wanted me close to him, that he was attracted to me, that's why he had appointed me, that he looked forward to being with me, that he did not want me to leave, that he enjoyed our Tuesday meetings because they gave him an opportunity to sit by me, to look at me, to be with me," etc., as anything other than sexual overtures. Complainant even characterized one of the statements as a "romantic overture," Tr., 22, but not "sexual in nature." Tr., 26. As discussed above, while on a motion of this nature the Commission is required to accept the facts as alleged by the complainant and all reasonable inferences from those allegations, it is not required to accept either unreasonable inferences from those alleged facts or untenable legal conclusions. Phillips v. DHSS & DETF, supra. Thus, in applying an objective, prudent person standard to the facts alleged by complainant, the Commission is not required to accept complainant's wholly untenable contention that a reasonable person would not have interpreted Dr. Leafgren's overtures as sexual in nature, and would not have been aware of the facts necessary to support complainant's theory of sexual harassment in November, 1989.

Complainant argues in his brief that the Commission must consider Dr. Leafgren's professional background in psychology and that "it is possible that Dr. Leafgren is very experienced in keeping his sexual overtures subtle and equivocal." However, in applying an objective standard to this case, the Commission has considered the facts as alleged by complainant himself. While it is possible that Dr. Leafgren could be subtle and equivocal in making sexual advances as complainant contends, his "possible" subtlety is totally at odds with the facts complainant alleges. There is nothing subtle about saying "'would you like to come up to my bedroom,'" and, after the offer is declined, saying "Well, are you sure you wouldn't want to come up here?'" Tr., 28. There is nothing subtle about a statement that: "he loved me, that he wanted me close to him, that he was attracted to me," etc. Tr., 30.

If all that were involved here were the events that allegedly occurred in 1989, this claim would have to be dismissed as untimely filed. However, if Dr. Leafgren engaged in a continuing course of conduct of sexual harassment starting in 1989 and continuing into the 300 day period prior to the filing of the complaint on September 19, 1991, this claim would not be subject to

dismissal, see, e.g., Berry v. Bd. of Supervisors, L.S.U., 715 F. 2d 971, 32 FEP Cases 1567, 1573 (5th Cir., 1983).

In addition to the alleged sexual overtures, the complaint also alleges retaliation by Dr. Leafgren as part of the quid pro quo sexual harassment:

> This included a malicious and intentional subversion of programs under Dr. Getsinger's direction, including Women's Psychological Programming, Employee Assistance Programming, Programs on Sexual and Alcohol Addictions, and Student Retention and Enrichment Programming.

The complaint does not specify when these alleged acts occurred. In complainant's brief, he refers to actions by Dr. Leafgren which occurred subsequent to November 1989. While it does not appear that any of these occurred within 300 days of September 1991, he also recounts subsequent additional acts of what he apparently alleges constituted sexual harassment. For example, he alleges that: "[O]n or about February 15, 1991, Dr. Leafgren indicated to complainant that he believed that complainant was being influenced by the women staff in the Counseling Center and that he was considering moving complainant downstairs to an office closer to Dr. Leafgren so they could work more closely together and he could have more of an influence on complainant." He also alleges that: "On or about the week of July 18, 1991, Dr. Leafgren met with complainant, hugged him, and told him he was very glad to see him and was looking forward to a closer relationship once complainant's office had been moved downstairs," etc. It is somewhat difficult to square these contentions in complainant's brief with his deposition testimony that after the March 6, 1990, incident (which complainant admitted was not a sexual advance toward him), there were no further "sexual overtures" from Dr. Leafgren, Tr., 45-46. However, at least some of these incidents arguably constitute inducements as part of an alleged pattern of quid pro quo sexual harassment -- e.g., "[O]n or about April 16, 1991, Dr. Leafgren came to complainant's office and promised him a promotion if they would work more closely together." Since complainant has alleged cognizable acts of sexual harassment falling within the 300 day time period before the date his complaint was filed, and that these acts were part of a continuing course of conduct of sexual harassment, the motion to dismiss this complaint as untimely filed must be denied.

Respondent also has moved to dismiss complainant's charge of "whistleblower" retaliation for failure to state a claim. The complaint alleges

> in whole or part, of a penalty, including but not limited to any of the following:
>
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
>
> (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
>
> (c) Reassignment.
>
> (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

The Commission will first address the allegations of harassment directed against complainant's counsel. In his brief in opposition to the motion to dismiss, complainant essentially admits that these actions are outside the purview of the statutory definition of "retaliatory action:"

> The list of actions cited as retaliatory meet the general definition of retaliation in Wis Stat Sec. 230.81 [sic], specifically there was verbal harassment and a virtual elimination of Complainant's employment responsibilities.
>
> In addition, Complainant believes that certain retaliatory acts were directed at his Legal Counsel as a means of intimidating both him and his attorney. If Respondent is resorting to such tactics in order to avoid the retaliation provisions of the statute, the Personnel Commission must react with vigor to ensure the safety and freedom from fear of persons who initiate and pursue Complaints of this nature. (emphasis added).

However this Commission is an administrative agency whose jurisdiction is strictly limited by statute, Board of Regents v. Wisconsin Pers. Comm., 103 Wis. 2d 545, 552, 309 N.W. 2d 366 (Ct. App. 1981). If the alleged harassment of complainant's attorney does not fall within the statutory definition of "retaliatory action," then the Commission has no authority over such a claim.

In enacting the whistleblower law, the legislature did not simply proscribe any conceivable form of retaliation against covered employes. Rather, it limited the coverage of the law to a very specifically defined "disciplinary action," as set forth as follows in §230.80(2), Stats.:

> (2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:

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penalty in employment is made clear by the enumeration in §230.80(2)(a) of "demotion, transfer, removal of any duty," etc. This requires that for other kinds of actions not specifically enumerated to constitute a "disciplinary action," they must be "of the same type or nature as those specifically enumerated." 157 Wis. 2d at 400. At the very least, to be a "disciplinary action," the employer's act must be related to the complainant's employment. This would not include, for example, allegations that Chancellor Sanders called the complainant's attorney a liar at a press conference, or that the attorney for Drs. Leafgren and Sanders, who also represented the landlord of complainant's counsel, "initiated restrictions on parking and access to the Redfield Law Offices which Jared Redfield believed to constitute a constructive eviction ... [in] an attempt to intimidate his counsel and disrupt his Counsel's representation of him."

In addition to alleged acts of harassment against his attorney, which do not fit within the definition of retaliatory action, there are a number of other acts of alleged retaliation. Complainant alleges that despite having learned on July 8, 1991, of the allegations against Dr. Leafgren, Dr. Sanders allowed him "to retire and publicly thanked and praised him for his work at the University. He did not appoint a committee to investigate the charges until September, 1991...." It is alleged that this failure to act "perpetuated and encouraged the hostile work environment and constituted a retaliatory act against complainant and others...." Since complainant has alleged that he was sexually harassed by Dr. Leafgren as late as the week of July 18, 1991, Dr. Sanders' failure to have acted against Dr. Leafgren after learning of the complaints against him on July 8, 1991, could be characterized as a "disciplinary action," in that by his failure to act, Dr. Sanders arguably facilitated "verbal or physical harassment," §230.80(2)(a), with respect to complainant's employment. Accordingly, it cannot be said that this facet of complainant's charge fails to state a claim upon which relief can be granted.[2]

Complainant's brief also contains the following allegation:

> At a meeting on July 31, 1991, among Academic Staff and faculty members, including Complainant, Dr. Sanders indicated that those who discussed the topic of Dr. Leafgren's leave of absence and the

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[2] Complainant's situation is distinguishable from Mr. Kuri's who also alleged Chancellor Sanders' failure to act was an act of whistleblower retaliation. Mr. Kuri never alleged any harassment occurred during the period subsequent to July 8, 1991. See Case No. 91-0141-PC-ER.

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context of the alleged "verbal harassment" referred to in complainant's brief. To that extent, the Commission holds that, as a matter of law, the allegation that Dr. Sanders said he was unjustly accused of sexual harassment by another employe and distributed copies of that employe's complaint does not constitute verbal harassment of complainant.

Complainant's brief also contains the following:

> In Dr. Sanders' statement published in the Pointer Alumnus in the Winter 1992 edition, he said: "In recent months, many UW-SP alumni and friends have heard and read about the allegations of discrimination and sexual harassment leveled against the university and many of its representatives. Sadly, this negative publicity has, in some instances, promulgated accusations that are not true, but that nevertheless have inflicted unwarranted damage to the institutions's reputation and programs..." Complainant is aware of this statement and it caused him great distress as he believes the statement implies Complainant is being untruthful in his Complaint.

The Commission fails to see how the chancellor's denial of these charges can even arguably be equated with verbal harassment, or any other kind of retaliatory action, against complainant. This action does not in any way involve complainant's employment.

Complainant further alleges that during his annual evaluation in the Spring of 1992, the acting assistant chancellor "cut out six of Complainant's remaining responsibilities." He also alleges that he was scheduled for a "triennial review" in 1991-92, rather than 1993-94, as had been another similarly-situated colleague, and that the review contained some negative ratings, despite the fact that he previously had a favorable review. These transactions fall within the parameters of "disciplinary actions" as set forth in §230.80(2), Stats., and therefore are not subject to dismissal for failure to state a claim.

The Commission notes that certain of the transactions discussed above were not mentioned specifically in the complaint and occurred after the complaint was filed. While the Commission has addressed these transactions in the context of the issues raised by this motion for the sake of economy, it does so subject to the proviso that these transactions will not be properly before the Commission unless the complainant obtains leave to amend the complaint to add these matters. The Commission also notes that the parties have agreed "that to the extent there were parallel federal proceedings pending with respect to any of these matters, that those cases which the Commission has not

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Case Nos. 91-0140-PC-ER,
91-0141-PC-ER,
91-0159-PC-ER,
92-0037-PC-ER

RULING ON COMPLAINANTS' MOTION FOR INTERLOCUTORY ORDER

This matter is before the Commission with respect to complainants' request for restraining order filed March 31, 1992, which requests (as amended), "a Restraining Order against representatives of the University of Wisconsin Stevens Point, and in particular Chancellor Sanders, to preclude any further public statements concerning the complaints." The parties have presented briefs and arguments with respect to the motion.

Initially, while the Commission has no authority under the Fair Employment Act (FEA) (Subchapter II, Chapter 111, Stats.) to issue interlocutory orders, Van Rooy v. DILHR & DER, 87-0117-PC, 87-0134-PC-ER (10/1/87), such authority is available under the "whistleblower" law (Subchapter III, Chapter 230, Stats.) at §230.85(3)(c), Stats. Therefore, there is authority to issue a temporary restraining order with respect to so much of these matters that involve whistleblower claims. The Commission will address the question of whether the complainants have made a threshold showing that such a restraining order would be appropriate.

The underlying basis for the motion is an alleged series of statements by respondent's agents, which have been calculated to denigrate not only the merits of the complaints but also the good faith of the complainants and their attorney and to intimidate them. These statements may be summarized as follows: