STATE OF WISCONSIN PERSONNEL COMMISSION

CYNTHIA CHELCUN,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stevens Point),

Respondent.

Case No. 91-0159-PC-ER

DECISION AND ORDER

This case is before the Commission on respondent's motion to dismiss for untimeliness and for failure to state a claim upon which relief could be granted. Also at issue is complainant's motion to amend her complaint for a second time. The parties filed briefs on these issues, with the last brief filed on November 10, 1993.

The following Findings of Fact are based upon information provided by the parties, and are made for the purpose of resolving the pending motions.

FINDINGS OF FACT

1. Complainant commenced her employment with respondent in 1978 as an admissions counselor. In 1981, she became a student advisor and part-time student conduct officer. In 1985, she became Associate Director of Life Planning in the student Enrichment and Retention Programs (Counseling Center) in the Division of Student Life. Effective June 30, 1992, she resigned. The director of the Counseling Center served as complainant's supervisor. The director until 1988 was Dr. Dennis Elsenrath, who was succeeded by Dr. Stephen Getsinger. Both Drs. Elsenrath and Getsinger reported to the head of the Division of Student Life, a position held by Assistant Chancellor Frederick Leafgren until June 22, 1991, when he was succeeded by Dr. William Meyer.

2. Complainant filed a complaint with the Personnel Commission on October 23, 1991, alleging that respondent discriminated against her on the bases of sex and retaliation for activity protected under the Whistleblower Act

(s. 230.80, et. seq., Stats.). The discriminatory acts alleged are summarized below.

A. Excessive responsibilities and lack of authority. (No specified incidents or dates, except as noted below.)
B. Unclear and/or nonexistent communication. (No specified incidents or dates.)
C. Unreasonable demands. (No specified incidents or dates, except as noted below.)
D. Success without tangible promotion. (No specified incidents or dates, except as noted below.)
E. Promotions into dead-end positions. (No specified incidents or dates.)
F. Ending of her work in the TIES and PAC projects. PAC ended 8/17/84 and TIES in mid-1986. Complainant claims these projects were maneuvered from her to the Wellness project by Dr. Leafgren, Dennis Elsenrath, and William Hettler (serving as respondent's director of student health services) without giving her any credit, that someone else copyrighted her TIES programming, and that she was required to work long hours because her male colleagues were working on the Wellness project. She further alleged concerns clearly beyond the Commission's jurisdiction to consider, including her perception that a professional conflict of interest existed in transfer of the projects to the Wellness Institute and in her male colleagues working to advance the interests of the Wellness Institute.
G. Several allegations relating to her position as co-director of the Academic Advertising Center from 1985-89. She alleged that Dean Schurter singled her out for criticism and supported the men; that in 1985, she was expected to have budget responsibilities but the budget was given only to her male co-director; that Dean Schurter questioned her choice of clothes and that Dean Schurter questioned her professional decision making.
H. One month demotion and other allegations regarding a 1989 re-titling process. Complainant alleged she felt harassed by Ronald Junke, Director of Personnel, who allegedly was solely responsible for the demotion decision and allegedly told complainant she "didn't fit the bill anymore" and would "fall a pay grade lower". Complainant felt "mostly" women were singled out for this treatment by Junke's committee, and allegedly discussed her views with Mary Williams, respondent's affirmative action coordinator, whom complainant says did nothing to address her concerns.
I. Sometime prior to 11/1/91, before Dr. Leafgren retired, Dennis Elsenrath allegedly told Dr. Patricia Doherty that Dr. Leafgren did not like dealing with female managers; an attitude which Mr. Elsenrath was unwilling to confront. He allegedly concluded that probably no opportunities would exist for females in the Division.
J. Complainant alleges that Dr. Leafgren created an atmosphere of women-hating which was followed by his male management team.[1]

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[1] The only "members of Dr. Leafgren's management team" evident from these pleadings are Drs. Dennis Elsenrath and Stephen Getsinger.

K. Complainant's allegation is based on incidents in the summer of 1991, when Cregg Kuri, a male student, confided in complainant that he had a long-standing relationship with Dr. Leafgren. In relation to this disclosure, complainant alleged that Chancellor Sanders threatened her and others about spreading rumors about Dr. Leafgren.

3. Respondent deposed complainant on November 21, 1991, at which time she acknowledged she was not at the meeting where Chancellor Sanders allegedly made the threat. She further acknowledged that Chancellor Sanders did not even know who complainant was at the time of the alleged threat.

4. According to complainant's deposition, Dr. Leafgren, Chancellor Sanders, Mr. Rohland Junke, and Dr. Hettler never made sexual advances towards her. (Par. 24 of the Initial Determination (ID)).

5. According to complainant's deposition, she received the available merit increases, she never received any discipline, and she never sought a promotion. (Par. 25 of the ID).

6. At the deposition, respondent invited complainant to identify all discriminatory actions taken against her by respondent. Some alleged acts mentioned at the deposition were not included in her original complaint (or in either of the requested amendments described in paragraphs 7 and 10 below). The new information is summarized below.

L. During the early 1980s, five men in the Division were granted indefinite appointments. At a public meeting, she questioned why only men were granted these types of appointments since she found herself equally qualified. (From par. 4 of the Initial Determination (ID)).

M. In September of 1989, Dr. Leafgren approved a one-half time parenting leave for complainant saying: "We don't like to do these things, but we have to, you know." When complainant asked him about the comment, he compared complainant to another woman who took a parenting leave. (From par. 16 of the ID).

N. In 1989, asbestos was being removed from the building in complainant's work area. She expressed concern to Dr. Leafgren about this activity and he said there was nothing to be concerned about. (From par. 17 of the ID).

O. In the Fall of 1990 (and before 10/30/90), complainant was asked by Mr. Karg to write an article for the student life newsletter. During the course of writing the article, Mr. Karg told Dr. Getsinger: "Can you just get this woman [referring to complainant] to do this thing." (From par. 18 of the ID).

7. Complainant filed a first-amended charge of discrimination on April 8, 1992. The alleged bases for discrimination were the same as noted in the initial charge. The following alleged acts found in the initial complaint (listed in par. 2 above) were re-alleged here as follows: items "A" through "E", item "F" (except the copyrighting allegation was dropped), and items "G" through "K". The only new information in the first amendment is summarized below.

- Fredrick Leafgren as alleged discriminator on the basis of sex and hostile work environment.
- Keith Sanders as alleged discriminator on the basis of hostile work environment and whistleblower retaliation.
- James Schurter as alleged discriminator on the basis of gender.
- Rohland Junke as alleged discriminator on the basis of gender.

8. On June 15, 1993, respondent filed a motion to dismiss for untimeliness and for failure to state a claim upon which relief could be granted.

9. An initial determination (ID) was issued on August 31, 1993, which found No Probable Cause to believe that the alleged discrimination occurred. Specifically, the claims of whistleblower retaliation and sexual harassment were rejected. Also rejected were the claims of sex discrimination in relation to terms and conditions of employment because the investigator found them untimely. Complainant appealed the ID.

10. Complainant filed a second amendment to her charge of discrimination on September 29, 1993 (after the ID was issued). For the first time she alleged retaliation for activities protected under the Fair Employment Act (FEA retaliation) as a basis for discrimination. The information contained in this second amendment was the same as in the first amendment except the four specified wrongdoers listed in paragraph 7, were deleted. Complainant's affidavit attached to the second amendment also contained new acts/information complained of, as summarized below.

P. Complainant provided the following additional details regarding the relationship between Mr. Kuri and Dr. Leafgren:
   i) That in the summer of 1991, Mr. Kuri disclosed to complainant that he had been enticed into a prolonged sexual relationship

with Dr. Leafgren.[2] As a result, complainant felt caught in the middle between Mr. Kuri and her boss (Dr. Leafgren), a situation which she found intolerable professionally, ethically and emotionally.

ii) All during July 1991, complainant was isolated in the counselling center with 2 colleagues; both of whom provided support to Mr. Kuri. Chancellor Sanders did not ask complainant for her impressions regarding Mr. Kuri's allegations, but he did ask her two colleagues.

Q On 8/7/91, complainant spoke with Assistant Chancellor Helen Godfry about pervasive discrimination against females, as well as mistreatment of men. Complainant further alleged that Ms. Godfry in 8/91, added to complainant's feelings of isolation by asking "loyal employees" not to spread false rumors. It is unclear whether the group of "loyal employees" included complainant.

R. Several allegations were made relating to a Campus Subcommittee formed in early September, 1991, to conduct campus-wide program reviews and to make budget recommendations. Specific allegations are noted below:

i) Complainant found the subcommittee's scrutiny difficult and distracting.

ii) Complainant's friend, Dr. Patricia Doherty, wrote to Chancellor Sanders requesting suspension of the subcommittee until the Kuri investigation was completed and the atmosphere less tense. The Chancellor did not respond.

iii) The Counseling Center's report was delivered to the task force on 11/1/91. On or about 12/18/91, the Task Force compiled its response which included a recommendation to transfer complainant's position from the Counseling Center to the Career Services Office.

iv) Dr. Meyer informed complainant on 3/5/92, that the recommended transfer would occur. He indicated complainant could stay at the Counseling Center but would have to take a demotion to do so. Complainant felt the recommended transfer and offered demotion were due to retaliation.

S. On 9/13/91, Chancellor Sanders announced the formation of an Investigation Committee which ultimately found that complainant was the victim of a gender-based hostile working environment.

T. On 9/16/91, complainant requested a leave of absence which was granted on 9/18/91, by Dr. William Meyer, the new assistant to the chancellor. She requested and was granted 75% leave from 10/1/91-12/31/91, and full-time leave from 1/1/92-6/30/92, when she returned to work. At deposition, complainant alleged that during her leave some male co-workers asked here whether she was enjoying shopping, and whether she was doing more cooking. (Depo, pp. 64-65).

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[2] Mr. Kuri's claims of sexual harassment involving the alleged relationship with Dr. Leafgren were dismissed on the merits in a different forum. Kuri v. University of Wisconsin - Stevens Point and Dr. Kuri, 92-C-740-S (WD Wis. 5/21/93).

U. Several allegations relate to press and other coverage of complainant's charge of discrimination, as noted below. Complainant claims she felt isolated as a result of the incidents listed below and that acquaintances refused to speak to her when she reported to work. She characterizes these acts as retaliation due to filing her complaints with the Attorney General's (AG) office, the Commission and respondent's affirmative action office.

i) On 10/24/91, a newspaper article appeared about complainant's claim with the AG's office. The article did not mention her by name. Complainant says she later learned that Dr. Sanders made statements about this claim at a Kiwanis club meeting the same day. While he did not use her name, complainant felt the "facts revealed in her complaint" could lead others to discover her identity.

ii) On 10/30/91, Chancellor Sanders in a press conference said harassment charges unjustly accused him. He did not mention complainant's name, but complainant felt it was unfair for the chancellor to use the press as a forum for her charges. He also addressed the faculty about her complaint and distributed copies of the same at this meeting. While he did not mention her name and while her name was blocked out on the handout, complainant felt her identify was discernible from facts recited in the complaint.

iii) On 10/31/91, an article appeared in the student newspaper in which Chancellor Sanders made a denial similar to "ii" above.

iv) On 10/30/91, Chancellor Sanders distributed copies of complainant's complaint at a general faculty meeting. Her name was omitted from the distributed complaint, but complainant felt her identity could have been deduced by meeting participants. She alleges this incident caused her depression, anxiety and fear.

v) On 11/29/91 complainant learned of two incidents (dates not given) where Chancellor Sanders allegedly visited class rooms and talked about the sexual harassment charges.

vi) On November 1 & 5, 1991, letters to the editor were printed in a local newspaper which characterized complainant's allegations as crazy, vague, false and slandering.

vii) On 11/4/91, the names of all complainants filing against respondent at or near the time of Mr. Kuri's disclosure, were listed in the newspaper by name.

V. Complainant alleges she was constructively discharged effective 7/1/92. Specifically, complainant says she heard nothing further from Dr. Meyer for a 6-week period after their conference on 3/5/92. Therefore, she quit on 4/27/92, effective 7/1/92 (at the end of her leave of absence. Complainant attributes the constructive discharge to retaliation for her support of Mr. Kuri and for filing her own discrimination complaint. This is an allegation of FEA retaliation (as opposed to retaliation under the whistleblower law).

DISCUSSION

A. Standard of Review

The motions to dismiss filed by respondent (based on timeliness and failure to state a cause of action) are reviewed here under the standard described in Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89, aff'd Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992), as follows:

> [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.
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> ... A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that [complainant] can prove in support of his allegations.

B. Timeliness Issues Regarding Initial Complaint and First Amendment

The allegations made in the initial complaint and the first amendment are sufficiently the same to treat together for purposes of this discussion. The allegations include several discrete, separate events along with an allegation of a continuing harassing atmosphere created by Dr. Leafgren.

Section 111.39(1), Stats., creates a 300-day statute of limitations for discrimination complaints. Ms. Chelcun's initial complaint was filed on 10/23/91, leaving a 300-day statute-of-limitations period from 12/27/90 - 10/22/91. Alleged events falling within the 300-day period are timely. Specifically, items "I" through "K" listed in paragraph 2 of the Findings of Fact are timely.

Events alleged in the initial complaint which occurred prior to 12/27/90, may be considered timely if part of a continuing violation. In other words, those earlier events alleged as part of Dr. Leafgren's harassing atmosphere could be considered timely-filed under some circumstances.

The TIES and PAC project incidents alleged wrongdoing by Dr. Leafgren. The Commission, however, ultimately rejects the contention that these allegations were part of the alleged continuing violation for the reasons detailed below.

Complainant alleged that the PAC and TIES programs were taken away from her by Dr. Leafgren for discriminatory reasons. She agrees that the PAC program ended 8/17/84, and that the TIES program ended in mid-1986. Considering the original complaint alone, the next alleged negative act of Dr. Leafgren (chronologically speaking) is his involvement with Mr. Kuri, allegedly revealed to complainant in the early summer of 1991 (which does not even constitute an alleged negative act directly taken against complainant). Thus, there was a period of about four years (from mid-1986 to 1991) without any specific alleged negative act by Dr. Leafgren or by the managers he purportedly controlled.

Furthermore, the period free of specific complaints about Dr. Leafgren (or the managers he controlled) does not improve significantly even considering the additional allegations made in complainant's deposition and second amendment. The alleged negative act of Dr. Leafgren most contemporaneous to the ending of PAC and TIES from any of these additional sources would be either the September 1989 alleged comment by Dr. Leafgren about parental leave or the 1989 (date unspecified) comment which he allegedly made about asbestos. The resulting time between the allegations, therefore, is about three years (from mid-1986 to some time in 1989).

This significant period of time without specific alleged negative acts by Dr. Leafgren (or the managers he controlled) "breaks the chain" in complainant's attempt to use a continuing violation theory to bootstrap the ending of the PAC and TIES programs to the charge of discrimination filed on 10/13/91. Therefore, the allegations made in item "F" recited in paragraph 2 of the Findings of Fact are untimely.[3]

The initial complaint makes additional specific allegations of events prior to the 300-day limitations period. These include items "G" and"H" recited in paragraph 2 of the Findings of Fact. These allegations cannot be considered part of complainant's continuing violation because neither Dr. Leafgren nor

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3 Complainant also alleged that male colleagues were allowed to travel in connection with the PAC and TIES programs after they were taken by the Wellness program. At deposition, however, she was unable to provide any dates the men travelled that she also would have wished to go. She indicated the core of her concern was that the travelling men, in effect, reaped the glory from her labors. How this concern was caused by Mr. Leafgren remains unexplained, other than his decision to discontinue the PAC and TIES as programs pursued by respondent.

managers purportedly under his control were alleged actors. Therefore, the allegations made in items "G" and "H" are untimely.

Several non-specific allegations were made in the initial complaint without any specified dates. These allegations are recited in items "A" through "E" in paragraph 2 of the Findings of Fact. Despite two filed amendments, the taking of complainant's deposition and the pending motions with extensive briefs filed, all while being represented by counsel, complainant has failed to provide dates to establish the timeliness of these general allegations. Complainant also has not provided any additional details to support these general allegations. The Commission therefore finds that complainant has not alleged sufficient facts to enable the Commission to find that these general allegations were filed timely either as part of a continuing violation of a hostile atmosphere created by Dr. Leafgren or as discrete events standing alone.

C. Complainant's Request to Amend the Complaint a Second Time

General Principles

The 300 day statute of limitations period created by s. 111.39(1), Stats., was noted above. As a statute of limitations rather than a jurisdictional requirement, the 300 day time limit is subject to equitable tolling. Sprenger v. UW-Green Bay, 85-0089-PC-ER (1/24/86). Some basic principles of equitable tolling as they relate to amendments are recited below and are consistent with §PC 2.02(3), Wis. Admin. Code, which further reflects that granting amendments is a matter within the Commission's discretion.

A complaint places the respondent on notice of two basic elements, to wit: the act complained of (such as failure to hire) and the discriminatory bases alleged (such as race and age). The Commission generally has allowed amendments to add an alleged basis of discrimination, but not to add acts complained of which bear no relation to the act complained of in the original complaint. Compare, for example, Jones v. DNR, 78-PC-ER-12 (11/8/79) and Adams v. DNR & DER, 80-PC-ER-22 (1/8/82), where amendment was permitted to add additional basis of discrimination; to Pugh v. DNR, 86-0059-PC-ER (6/10/88) where amendment was not permitted to add discrete, separate personnel

transactions whether such newly-alleged acts pre- or post-dated the act complained of in the original complaint.

The distinction made in the Commission cases noted above represents a balancing of interests between the parties. The basic principle is that a respondent must receive notice of the action complained of in a timely manner to enable prompt internal investigation, identification of witnesses and related documents. This basic principle promotes the opportunity for reasonably prompt settlement where appropriate and for preservation of evidence where settlement is not feasible; such goals serving the interests of both parties. While later amendment to add a suspected basis of discrimination may create some burdens for the parties, the burden is lessened by the fact that the parties already have had an opportunity to identify witnesses and preserve evidence. The burden for both parties is much greater where the amendment attempts to add an act which does not relate to the act complained of in the initial complaint. This is true because the opportunities to identify witnesses and preserve evidence is jeopardized.

Even where an amendment would be favored under principles mentioned above, the Commission has rejected amendment where the amendment was not requested until after the Initial Determination was issued. The Commission has been consistent in reaching this conclusion where, as here, complainant has had ample opportunity to amend previously and has been represented by counsel throughout the proceedings. Ferrill v. DHSS, 87-0096-PC-ER (8/24/89). The Commission, of course, has processed allegations made in tardily-filed amendments as a new charge of discrimination when filed within 300 days of the newly-alleged adverse actions.

Analysis of the Proposed Second Amendment

The requested second amendment was filed with the Commission on 9/29/93, which was after the parties already had conducted discovery (including complainant's deposition on 11/21/91) and after the No Probable Cause ID was issued (on 8/31/93). The amendment complains of several new acts and also mentions for the first time FEA retaliation as a suspected basis of discrimination. The new allegations/information are summarized as items "P" through "V" in paragraph 10 of the Findings of Fact.

Item "P" contains additional details regarding complainant's alleged support of Mr. Kuri. This topic was raised in the initial complaint in relation to complainant's claim of retaliation based on the whistleblower law. The new information does not substantively change the initial complaint and is, therefore, accepted as an amendment to the whistleblower claim.

Item "Q" of the second amendment really is in the nature of evidence which could be offered in support of sex discrimination/harassment allegation raised in the initial complaint. Therefore, no need exists for the Commission to rule on its timeliness.

Item "R" contains new acts complained of relating to the Campus Subcommittee formed in September of 1991. These new acts cannot be characterized as part of a continuing negative atmosphere created by Dr. Leafgren because he (or the managers he purportedly controls) is not among the people identified as actors. Furthermore, Dr. Leafgren no longer worked for respondent when the task force recommendation was made to transfer complainant's position to another department. Nor are the new allegations eligible for treatment as a separate complaint because the allegations were not filed until 9/29/93, which was more than 300 days after the task force made its recommendation to transfer complainant's position. The Commission therefore finds that item "R" was untimely filed.

Item "S" refers to formation of respondent's investigation committee. This information does not allege a new discriminatory act or discriminatory basis. It is more in the nature of evidence and, therefore, does not require a Commission ruling on timeliness.[4]

Item "T" alleges new information about leaves of absence granted by Dr. William Meyer. This allegation does not allege any wrongdoing, per se because the requested leaves were granted. Rather, it has potential relevance to the issue of damages. Since this decision results in dismissal of the complaint and, therefore, no hearing will be held, the issue of damages is moot.

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4 The Commission notes that respondent's investigative committee was free to and did consider all of the allegations submitted to it by complainant without regard to statutory timeliness issues which the Commission must consider. The investigative committee also measured the allegations by its internal definition of sexual harassment, which is not the same as found in the FEA.

Item "U" alleges new information relating to press and other coverage of Dr. Leafgren's relationship with Mr. Kuri as well as various discrimination complaints filed by others as a result of that relationship. Some of these allegations complain of decisions made by various entities and acts unconnected to respondent, such as a newspaper's decision to print information apparently obtained from public records rather than from any direct link to respondent. Those allegations are beyond the scope of protection under the FEA and beyond the Commission's jurisdiction.

Other allegations in item "U" involve Chancellor Sanders' use of the media and his professional contacts as forums for pleading respondent's case. Complainant felt that airing issues in those forums was inappropriate, resulted in her increased feelings of isolation and were taken in retaliation for the filing of her complaints. Dr. Leafgren is not alleged as an actor in relation to these claims, nor is Chancellor Sanders a manager over whom Dr. Leafgren purportedly exercised control. Dr. Leafgren may have created the underlying controversy by having a relationship with a male student, but he is not alleged as having used inappropriate forums to air the case. In fact, some of the alleged negative acts occurred when Dr. Leafgren no longer worked for respondent. Therefore, these allegations cannot be characterized as part of a continuing harassing atmosphere caused by Dr. Leafgren. Nor do these acts stand alone as a new complaint because the claims were not filed until 9/29/93, more than 300 days after the alleged acts occurred.

Complainant's second amendment also raises constructive discharge for the first time (item "V"). The alleged constructive discharge date was 6/30/92, about 8 months after the initial complaint was filed and after Dr. Leafgren no longer worked for respondent. Furthermore, the allegation was not filed until 9/29/93, which was after the ID was issued and about 1-1/2 years after the alleged discharge date. This allegation was filed too late to be considered as part of the original complaint. Further, the constructive discharge allegation is not entitled to treatment as a separate complaint because it was filed more than 300 days after the alleged event. Whatever relevance the constructive discharge evidence might have had on the damages issue is moot because, as a result of this decision, no hearing will be held.

Complainant attempts in the second amendment to add an alleged basis of discrimination. For example, paragraph 55 of the second amendment asserts

a claim for retaliation under the Fair Employment Act (FEA retaliation), stating as follows:

> 55. I believe that the events leading to my constructive discharge from UW-SP on July 1, 1992, are the result of continuing retaliation including demotion, reassignment, and reduction in base pay by the Chancellor and administration of UW-SP for (1) my role in supporting the student [Mr. Kuri] who filed a sexual harassment complaint against Dr. Leafgren and, (2) my own filing of sexual discrimination/harassment complaint in October, 1991.

The only acts which conceivably could have been caused by either complainant's support of Mr. Kuri or the filing of her initial complaint are adverse actions which occurred after those events. Mr. Kuri's disclosure to complainant occurred in early summer 1991 and her initial complaint was filed on 10/23/91. The only remaining[5] alleged adverse action meeting this timetable is the perceived threat by Chancellor Sanders in or about September 1991, which was alleged in the initial complaint. (See item "K" in paragraph 2 above). The Commission, therefore, would allow an amendment to add FEA retaliation but only as a new suspected reason for the Chancellor's perceived threat. Further, the FEA retaliation claim allowed here can only be based upon complainant's support of Mr. Kuri. The additional FEA-protected activity of filing her initial complaint is inappropriate to add because it did not occur until after the perceived threat was spoken by Chancellor Sanders.

The Commission also notes that alleged FEA retaliation based on the filing of the initial complaint cannot be considered to "relate back" to the initial complaint. It cannot be considered part of the same acts alleged in the initial complaint because it is based upon the subsequent act of filing of the initial complaint. The Commission, of course, has treated such new allegations as a separate charge of discrimination, but such option is not available here due to timeliness problems. Specifically, the second amendment was not filed until 9/29/93, leaving a 300-day appeal period from 12/3/92 to 9/29/93. Complainant's alleged discharge date, however, was 6/30/92. Therefore, it is not possible that any retaliatory action based on filing the initial complaint

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5 The term "only remaining alleged adverse actions" means those actions which were not eliminated in the foregoing parts of the discussion.

was taken by respondent within the 300-day period prior to filing the second amendment.

D. Deposition Amendments - Timeliness Concerns

The amendments made at deposition on November 21, 1991, are shown as items "L" through "O" in paragraph 6 of the Findings of Fact.

Item "L" involves five indefinite appointments during the 1980s which were granted to men. Neither Dr. Leafgren nor the managers he purportedly controlled were alleged to have been the decision maker in any of the five appointments. Even if Dr. Leafgren and/or his managers had been accused of wrongdoing, the Commission would reject the requested amendment for the same reasons as previously discussed in relation to the PAC and TIES programs; to wit: a significant subsequent period of time passing without any alleged wrongdoing by Leafgren and/or his managers.

Item "M" involves Dr. Leafgren's alleged parental leave statement in September of 1989. Item "N" involves his alleged 1989 statement about asbestos. Each allegation involves a discrete, separate event which would not be considered timely as a general rule. Complainant, however, argues such statements were made as part of Dr. Leafgren's continuing policy of creating a hostile working atmosphere for women. Even if considered as such, the next alleged wrongdoing by Dr. Leafgren (or his managers) occurred about one year later. This is a significant break in time and, here, is fatal to a claim involving a continuing violation.

Item "O" is untimely. The allegation involves a statement made in the fall of 1990, concerning complainant's newsletter article and alleged offensive statements by Mr. Karg. Neither Dr. Leafgren nor his managers are alleged actors here. Therefore, this claim cannot be characterized as part of Dr. Leafgren's continuing pattern of creating a hostile work environment. Further, the claim does not otherwise relate to acts alleged in the initial complaint. Standing alone the allegation was untimely filed, having been raised more than one year after the alleged event.

E. Surviving Allegations

Attachment 1 to this decision shows all allegations (from "A" to "V") listed in paragraphs 4 and 10 of the Findings of Fact. The attachment indicates

which allegations survived the preceding analysis. The Commission's following analysis of the motions to dismiss for failure to state a claim are based solely on the surviving allegations, as noted in the attachment.

F. Failure to State a Claim of Whistleblower Retaliation

The surviving allegations relative to the whistleblower complaint involve Chancellor Sanders' alleged threat after Mr. Kuri spoke to complainant about his alleged relationship with Dr. Leafgren. (See item "K" in paragraph 2 of the Findings of Fact, and item "P" in paragraph 10). Complainant concedes such "threat" occurred at a meeting she did not attend and at a time when Chancellor Sanders did not know her.

The Commission agrees with respondent that no disciplinary action has been alleged which would meet the definition in the whistleblower statute (s. 230.80(2), Stats.), as shown below.

> (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: (Emphasis added.)
> (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.

Only those personnel actions which have a substantial or potentially substantial negative impact on an employe fall within the definition of "disciplinary action" found in s. 230.80(2), Stats. The common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform one's job efficiently. Vander Zanden v. DILHR, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; aff'd by Court of Appeals 88 CV 1223, 1/10/90.

The Commission finds that as a matter of law, the alleged threat by Chancellor Sanders is insufficient to be considered as a "disciplinary action" within the meaning of s. 230.80(2), Stats. Specifically, complainant concedes

that she was not present at the time the alleged threat occurred and that Chancellor Sanders did not even know who she was when the threat was made. Under these circumstances and with no other surviving allegations meeting the statutory definition of "disciplinary action", the claim must be dismissed for failure to state a claim.

G. Failure to State a Claim of Sex Harassment and Sex Discrimination

General Principles-Probable Cause Stage

In order to make a finding of probable cause, there must exist facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed. PC 1.02(16), Wis. Admin. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981).

Failure to State a Claim of Sex Discrimination

A prima facie case of sex discrimination involving alleged discrimination in the terms and conditions of employment could be established, for example, if complainant proved the following elements: a) complainant is a member of a group protected under the FEA, b) complainant suffered an adverse term or condition of employment and c) the adverse term or condition existed under circumstances giving rise to an inference of discrimination.

Complainant failed to establish a prima facie case of sex discrimination. This is true even when the pleadings are liberally construed and when the probable cause standard (easiest standard for complainant) is applied.

Section 111.322, Stats., provides in pertinent part as follows:

> (1) ... [I]t is an act of employment discrimination to do any of the following:
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> (1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in the terms, conditions or privileges of employment ... because of [sex].
>
> (2) To print or circulate ... any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of [sex].

The statutory language illustrates the requirement for complainants to show some adverse action as a prerequisite to a finding of discrimination. The only claims surviving at this point are items relating to either damages (items "T" and "Y") or to the alleged harassing atmosphere (items "I, "J", "Q"), a topic which is discussed separately below. The failure to allege an adverse action taken because of complainant's sex is fatal to this claim.

Failure to State a Claim of Sex Harassment

Complainant must establish the following elements in order to prevail on her claim of sex harassment: a) she is a member of a group protected under the FEA, b) she was subjected to unwelcome harassment, c) the harassment was based upon complainant's sex, d) the harassment was so pervasive as to alter conditions of employment and create an abusive working environment, and e) that respondent knew or should have known about the harassment. Carlson v. The Three Star, Inc., ERD Case No. 84-01143 (LIRC, 8/27/86).

The second element recited above is based on the definition of sexual harassment found in section 111.32(13), Stats., as shown below.

> (13) "Sexual harassment" means unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes.

The surviving claims (items "I", "J" and "Q") allege that Dr. Elsenrath told Dr. Doherty about Dr. Leafgren's attitude towards women (item "I"); that Dr. Leafgren created an atmosphere of women-hating which was followed by his management team (item "J"); and that Ms. Godfry took no action in response to complainant's concerns expressed on 8/7/91, except to make complainant feel isolated. The surviving allegations are insufficient as a matter of law to meet the statutory definition of "sexual harassment".

Disparate Treatment Considered as Alternative Theory

The Commission considered whether the result would differ if complainant's sexual harassment claim were brought under the disparate treatment theory instead of harassment. The Commission concludes the result would remain the same.

Disparate treatment is the intentional use of gender (for example) to make employment decisions. In other words, the employer treats some people less favorably than others because of their sex. Vol. 1, Sullivan, Zimmer & Richards, Employment Discrimination, §3.1 (2d ed. 1988). Complainant feels Dr. Leafgren created an atmosphere under which women were treated less favorably than men.

Under the foregoing analysis, this claim could be viewed as an allegation of systemic disparate treatment pursuant to unwritten policies followed and fostered by Dr. Leafgren. Claims of this nature typically are established through statistical evidence of a gross and long-lasting disparity between (for example) the sexual composition of the employer's workforce as compared to the qualified labor pool. Id., Vol. 1, Employment Discrimination, §3.2.2.

The surviving claims (items "I", "J" and "Q") allege that Dr. Elsenrath told Dr. Doherty about Dr. Leafgren's attitude towards women (item "I"); that Dr. Leafgren created an atmosphere of women-hating which was followed by his management item (item "J"); and that Ms. Godfry took no action in response to complainant's concerns expressed on 8/7/91, except to make complainant feel isolated. The surviving allegations are insufficient as a matter of law to establish a claim of disparate treatment.

H. Summary

The Commission denies complainant's request to amend her complaint and further, grants (in part) respondent's motion to dismiss based on timeliness and (in full) based on failure to state a cause of action.

ORDER

The Commission orders that this case be dismissed with prejudice.

Dated: March 9, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JMR

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

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

Petition for Rehearing. Any person aggrieved by a final order 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.

Attachment 1

Out	A. Excessive responsibilities and lack of authority. (No specified incidents or dates, except as noted below.)
Out	B. Unclear and/or nonexistent communication. (No specified incidents or dates.)
Out	C. Unreasonable demands. (No specified incidents or dates, except as noted below.)
Out	D. Success without tangible promotion. (No specified incidents or dates, except as noted below.)
Out	E. Promotions into dead-end positions. (No specified incidents or dates.)
Out	F. Ending of her work in the TIES and PAC projects. PAC ended 8/17/84 and TIES in mid-1986. Complainant claims these projects were maneuvered from her to the Wellness project by Dr. Leafgren, Dennis Elsenrath, and William Hettler (serving as respondent's director of student health services) without giving her any credit, that someone else copyrighted her TIES programming, and that she was required to work long hours because her male colleagues were working on the Wellness project. She further alleged concerns beyond the Commission's jurisdiction to consider, including her perception that a professional conflict of interest existed in transfer of the projects to the Wellness Institute and in her male colleagues working to advance the interests of the Wellness Institute.
Out	G. Several allegations relating to her position as co-director of the Academic Advertising Center from 1985-89. She alleged that Dean Schurter singled her out for criticism and supported the men; that in 1985, she was expected to have budget responsibilities but the budget was given only to her male co-director; that Dean Schurter questioned her choice of clothes and d) that Dean Schurter questioned her professional decision making.
Out	H. One-month demotion and other allegations regarding a 1989 re-titling process. Complainant alleged she felt harassed by Ronald Junke, Director of Personnel, who allegedly was solely responsible for the demotion decision and allegedly told complainant she "didn't fit the bill anymore" and would "fall a pay grade lower". Complainant felt "mostly" women were signaled out for this treatment by Junke's committee, and allegedly discussed her views with Mary Williams, respondent's affirmative action coordinator, whom complainant says did nothing to address her concerns.
In	I. Sometime prior to 11/1/91, before Dr. Leafgren retired, Dennis Elsenrath allegedly told Dr. Patricia Doherty that Dr. Leafgren did not like dealing with female managers; an attitude which Mr. Elsenrath was unwilling to confront. He allegedly concluded that probably no opportunities would exist for females in the Division.

In J. Complainant alleges that Dr. Leafgren created an atmosphere of women-hating which was followed by his male management team.

In K. Complainant's whistleblower allegation is based on incidents in the summer of 1991, when Cregg Kuri, a male student, confided in complainant that he had a long-standing relationship with Dr. Leafgren. In relation to this disclosure, complainant alleged that Chancellor Sanders threatened her and others about spreading rumors about Dr. Leafgren.

Out L. During the early 1980s, five men in the Division were granted indefinite appointments. At a public meeting, she questioned why only men were granted these types of appointments since she found herself equally qualified. (From par. 4 of the Initial Determination (ID)).

Out M. In September of 1989, Dr. Leafgren approved a one-half time parenting leave for complainant saying: "We don't like to do these things, but we have to, you know." When complainant asked him about the comment, he compared complainant to another woman who took a parenting leave. (From par. 16 of the ID).

Out N. In 1989, asbestos was being removed from the building in complainant's work area. She expressed concern to Dr. Leafgren about this activity and he said there was nothing to be concerned about. (From par. 17 of the ID).

Out O. In the Fall of 1990 (and before 10/30/90), complainant was asked by Mr. Karg to write an article for the student life newsletter. During the course of writing the article, Mr. Karg told Dr. Getsinger: "Can you just get this woman [referring to complainant] to do this thing." (From par. 18 of the ID).

In-whistlbl. P. Complainant provided the following additional details regarding the relationship between Mr. Kuri and Dr. Leafgren:

i) That in the summer of 1991, Mr. Kuri disclosed to complainant that he had been enticed into a prolonged sexual relationship with Dr. Leafgren. As a result, complainant felt caught in the middle between Mr. Kuri and her boss (Dr. Leafgren), a situation which she found intolerable professionally, ethically and emotionally.

ii) All during July 1991, complainant was isolated in the counselling center with 2 colleagues; all of whom provided support to Mr. Kuri. Chancellor Sanders did not ask complainant for her impressions regarding Mr. Kuri's allegations, but he did ask her two colleagues.

Evidence Q On 8/7/91, complainant spoke with Assistant Chancellor Helen Godfry about pervasive discrimination against females, as well as mistreatment of men. Complainant further alleged that Ms. Godfry in 8/91, added to complainant's feelings of isolation by asking "loyal employees" not to spread false rumors. It is unclear whether the group of "loyal employees" included complainant.

Out R. Several allegations were made relating to a Campus Subcommittee formed in early September, 1991, to conduct

campus-wide program reviews and to make budget recommendations. Specific allegations are noted below:

i) Complainant found the subcommittee's scrutiny difficult and distracting.

ii) Complainant's friend, Dr. Patricia Doherty, wrote to Chancellor Sanders requesting suspension of the subcommittee until the Kuri investigation was completed and the atmosphere less tense. The Chancellor did not respond.

iii) The Counseling Center's report was delivered to the task force on 11/1/91. On or about 12/18/91, the Task Force compiled its response which included a recommendation to transfer complainant's position from the Counseling Center to the Career Services Office.

iv) Dr. Meyer informed complainant on 3/5/92, that the recommended transfer would occur. He indicated complainant could stay at the Counseling Center but would have to take a demotion to do so. Complainant felt the recommended transfer and offered demotion were due to retaliation.

Evidence S. On 9/13/91, Chancellor Sanders announced the formation of an Investigation Committee which ultimately found that complainant was the victim of a gender-based hostile working environment.

Out T. On 9/16/91, complainant requested a leave of absence which was granted on 9/18/91, by Dr. William Meyer, the new assistant to the chancellor. She requested and was granted 75% leave from 10/1/91-12/31/91, and full-time leave from 1/1/92-6/30/92, when she returned to work. At deposition, complainant alleged that during her leave some male co-workers asked here whether she was enjoying shopping, and whether she was doing more cooking. (Depo, pp. 64-65).

Out U. Several allegations relate to press and other coverage of complainant's charge of discrimination, as noted below. Complainant claims she felt isolated as a result of the incidents listed below and that acquaintances refused to speak to her when she reported to work. She characterizes these acts as retaliation due to filing her complaints with the Attorney General's (AG) office, the Commission and respondent's affirmative action office.

i) On 10/24/91, a newspaper article appeared about complainant's claim with the AG's office. The article did not mention her by name. Complainant says she later learned that Dr. Sanders made statements about this claim at a Kiwanis club meeting the same day. While he did not use her name, complainant felt the "facts revealed in her complaint" could lead other to discover her identity.

ii) On 10/30/91, Chancellor Sanders in a press conference said harassment charges unjustly accused him. He did not mention complainant's name, but complainant felt it was unfair for the chancellor to use the press as a forum for her charges. He also addressed the faculty about her complaint and distributed copies of the same at this

meeting. While he did not mention her name and while her name was blocked out on the handout, complainant felt her identify was discernible from facts recited in the complaint.

iii) On 10/31/91, an article appeared in the student newspaper in which Chancellor Sanders made a denial similar to "ii" above.

iv) On 10/30/91, Chancellor Sanders distributed copies of complainant's complaint at a general faculty meeting. Her name was omitted from the distributed complaint, but complainant felt her identity could have been deduced by meeting participants. She alleges this incident caused her depression, anxiety and fear.

v) On 11/29/91 complainant learned of two incidents (dates not given) where Chancellor Sanders allegedly visited class rooms and talked about the sexual harassment charges.

vi) On November 1 & 5, 1991, letters to the editor were printed in a local newspaper which characterized complainant's allegations as crazy, vague, false and slandering.

vii) On 11/4/91, the names of all complainants filing against respondent at or near the time of Mr. Kuri's disclosure, were listed in the newspaper by name.

Out

V. Complainant alleges she was constructively discharged effective 7/1/92. Specifically, complainant says she heard nothing further from Dr. Meyer for a 6-week period after their conference on 3/5/92. Therefore, she quit on 4/27/92, effective 7/1/92 (at the end of her leave of absence. Complainant attributes the constructive discharge to retaliation for her support of Mr. Kuri and for filing her own discrimination complaint. This is an allegation of FEA retaliation (as opposed to retaliation under the whistleblower law).