STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA WEEKS,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stevens Point),

Respondent.

Case No. 92-0036-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for failure to state a claim. Both parties have filed briefs through counsel.

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 case involves a complaint of discrimination on the basis of sex. The complainant alleges she was hired in a position that provided receptionist and clerical support within the Student Life Administration offices at UWSP. She alleges that:

> Initially, Ms. Weeks and Ms. Melton [a limited-term employe] worked together, however, as Ms. Weeks became more comfortable and capable of working independently at the receptionist area, she worked alone with the student employees.

> After a few weeks and after Ms. Melton was no longer there, numerous changes occurred. The student employees controlled the work. One student employee would only do what she wanted to, indicating that Fran had taught her to work this way. The other student employee was the only one who knew how to do supplies, vehicle maintenance, copy count reports, etc. They resented watering plants and seemed to want Ms. Weeks to perform whatever they thought were the menial tasks. Neither student employee would take directions from Ms. Weeks.
>
> As there was no supervisor to report to, confusion and tensions mounted between Ms. Weeks and the student employees. When Dr. Leafgren returned from China, he moved out of his office. Ms. Weeks was informed that he had retired due to an illness in his family.

After John Birrenkott became the acting supervisor, complainant and the student employes met with Mr. Birrenkott, but relationships with the students continued to be poor:

> Ms. Weeks did try to work with them, however, the student employees were not cooperative. They did not complete their projects or provide back up support on the telephone unless Mr. Birrenkott was present. They refused work and were disrespectful toward Ms. Weeks. One student employee even swore at Ms. Weeks. They repeatedly left her alone at the front desk where it was crucial to have a backup person to both answer the phone and to handle the receptionist's position. The only way the complainant could effectively work with them was to let them do whatever they wanted to do.
>
> The poor treatment and hostile work environment continued, but Ms. Weeks tried to ignore it and concentrate on her duties without asking for, or expecting, any assistance from the student employees.

Complainant further alleges that at Mr. Birrenkott's instigation her probationary employment was terminated for the stated reasons of budget cuts and inadequate performance. To this point, there has been no allegation that anything that occurred was motivated by complainant's gender. Her actual allegation of discrimination is as follows:

> Ms. Weeks believes that she was hired in a pervasively discriminatory and hostile work environment where women in general were denied recognition for their achievements and where clerical staff in particular were given no respect at all. The complainant believes she was set up to be a failure in a no-win situation in which she was intimidated, insulted, belittled, controlled and deceived by professional people. She experienced a large amount of stress and was used as a scape-goat by inexperienced and immature students who were allowed to act as her supervisors and who spent more time playing up to the men in her department and working on special projects for them (such

> as planning a birthday party for Mr. Birrenkott's wife during working hours) than they did working on departmental matters.

Complainant has not alleged any facts that could possibly amount to a claim of sex harassment as defined in the FEA at §111.32(13), Stats.: "unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature." Complainant does not allege that she was subject either to "quid pro quo" sexual harassment or conduct of a sexual nature -- e.g., lewd comments, sexual advances, etc.

Complainant still can state a claim of sex discrimination other than sexual harassment as defined in §111.32(13), if her complaint can be construed as alleging that she was discriminated against on the basis of her sex as set forth in §111.322(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 terms, conditions or privileges of employment....

Complainant's allegation, set forth above, that she "believes she was hired in a pervasively discriminatory and hostile work environment where women in general were denied recognition for their achievements and where clerical staff in particular were given no respect at all," etc., does not identify any specific "terms, conditions or privileges of employment" with respect to which she is alleging that respondent discriminated against her because of her sex. In her brief in opposition to the motion to dismiss, complainant states that an internal UW-SP committee report in response to a complaint of sexual harassment filed by Cynthia Chelcun, a professional employe in the Division of Student Life," acknowledged the existence of a hostile work environment in the Division of Student Life. The committee report, a copy of which was attached to complainant's brief, includes the following:

> It is clear that Cynthia Chelcun believes that what happened to her happened as a consequence of a pervasive sexist atmosphere which was demeaning and degrading to women, i.e., a hostile environment which constituted "sexual harassment."
>
> The committee is convinced that: 1) such an atmosphere existed in certain limited areas of Student Life, 2) that there were limitations on what a woman could and could not do in the Division of Student Life which were based on gender, and 3) That both 1) and 2) above were

> consciously or unconsciously the result of the actions of the former Assistant Chancellor for Student Life (Dr. Frederick Leafgren).

The problem with complainant's case is that she has not alleged that any of this sexist atmosphere found by the committee affected her terms, conditions or privileges of employment, in any direct or legally cognizable manner. For example, the committee noted that sexist jokes were sometimes told at staff meetings. Complainant has not alleged that she was exposed to this conduct. Neither the complainant nor complainant's brief in opposition to the motion to dismiss makes any connection between complainant's many problems with the student employes and any discrimination by respondent's agents against complainant on the basis of sex.

Complaint argues in her brief that:

> Certainly, hostile work environments may be difficult to prove. Where there is a hostile work environment characterized by a general hostility directed at women, those who come forward may not be able to point to blatant sexual attacks or offensive language. "Practices neutral on their face can be material [sic] if they operate to discriminate." Griggs v. Duke Power, 401 U.S. 424 (1971).

The disparate impact theory propounded in Griggs does not apply to this case. In Griggs, the Court held that Title VII: "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431, 91 S. Ct. at 853. This case does not involve a hiring requirement or other facially neutral employment practice that has a disparate impact on women. Rather, it involves an alleged hostile, sexist work environment. Neither Griggs nor the concept of disparate impact have any conceivable connection to this case. The second problem with complainant's contention is that the issue raised by the motion to dismiss is not addressed by pointing out the difficulty of proving a hostile work environment. In order to state a claim for sex discrimination under the FEA, complainant must allege that this asserted "hostile work environment characterized by a general hostility toward women," actually impacted her terms, conditions or privileges of employment in a legally cognizable manner. This she has not done.

If the Commission had any reason to believe that complainant's failure to allege any acts of sex discrimination against her could be attributed merely to a generalized pleading, certainly the complaint would not be susceptible to dismissal for failure to state a claim. However, neither the complaint not the complainant's brief has any shortage of specifics when detailing her areas of dissatisfaction with her working relationship with the student employes -- "[t]hey resented watering plants and seemed to want Ms. Weeks to perform whatever they thought were the menial tasks," etc. This specificity contrasts with complainant's failure in either her complaint or brief to suggest how the alleged hostile, sexist atmosphere had any impact on complainant, or had any relationship to her problems with the students or her eventual termination, beyond the general, conclusory comments discussed above. This juxtaposition compels the conclusion that this is not a technical pleading problem, but rather there is a fundamental absence of a cognizable claim of sex discrimination. Complainant's dissatisfaction with the student employes and other aspects of her work environment do not give rise to a sex discrimination claim because they occurred in a unit with respect to which the committee found that "a pervasive sexist atmosphere ... existed in certain limited areas." If complainant had alleged, for example, that she had been exposed to sexist comments, as part of such an atmosphere, or that Mr. Birrenkott had effected her termination because of her sex, clearly these kinds of allegations would state viable FEA claims. However, in the absence both of any kinds of allegations of this kind, and of any reason to believe this failure to allege a valid claim was a pleading problem, the Commission must conclude that this complaint fails to state a viable claim of sex discrimination.

To the extent that this complaint asserts that upper level management is liable for having failed to act with respect to the situation in Student Life, this aspect of the complaint is fatally undermined by the failure of the complaint to allege a legally cognizable claim that complainant was sexually harassed or subject to sex discrimination with respect to the terms, conditions or privileges of her employment with the Division of Student Life. The FEA does not impose an obligation on management to act if the conditions about which complainant was concerned did not involve discrimination, but rather involved inter-personal issues with other employes and other dissatisfaction with her working conditions.

ORDER

Respondent's motion to dismiss for failure to state a claim is granted, and this complaint is dismissed for failure to state a claim upon which relief can be granted.

Dated: April 30, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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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.