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STATE OF WISCONSIN

PERSONNEL COMMISSION

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KRISTINE MAKL,
 Complainant,

v.
President, UNIVERSITY OF
WISCONSIN SYSTEM (Stevens Point),
 Respondent.

Case No. 92-0038-PC-ER

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RULING
ON
MOTION
TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for failure to state a claim upon which relief can be granted. The 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 & DETE, 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).

Ms. Makl's complaint of sex discrimination contains three single-spaced pages of allegations of an unsatisfactory work environment in the Division of Student Life at UWSP. For the most part, these allegations consist of the recitation of specific problems Ms. Makl perceived in her relationship with supervisors (apparently most of whom were female), coworkers and others. By way of example, some of the allegations of the complaint are as follows:

While employed at the University of Wisconsin-Stevens Point, Ms. Makl experienced the effects of a hostile work environment in the form of unrealistic expectations, unreasonable work loads, verbal abuse, mistreatment due to unclear or missing communication, and different supervisors re-prioritizing her workload. She was repeatedly confronted with comments that her work was not good enough or done fast enough. She was isolated and reprimanded for doing work away from her desk when it was required for her job.

* * *

One of Ms. Makl's supervisors was Terri Gohmann. While working with her, Ms. Makl experienced a no-win situation, in that, no matter what she did, it wasn't right. Also, there were many things in her job position description that Terri did not permit Ms. Makl to do. One of the things was counseling students regarding misuse of their Point Cards. Ms. Gohmann did this.

* * *

While Ms. Makl was working in her office with her door shut Robert Nicholson, Director of Student Conduct, would open the door, walk in without knocking, and throw down what he wanted done, right in the middle of her desk and on top of things she was working on at the time. Dr. Nicholson wanted things done right here and right now for him. If the work wasn't done when he asked for it, he would contact Ms. Gohmann who would then insist that Ms. Makl complete Dr. Nicholson's work, even though she may have been working on something for another supervisor. One time, Dr. Nicholson got upset with Ms. Makl when she was talking with one of the Hall Directors because she was not at her desk, available to immediately do his work. These were additional reasons that Ms. Makl was unable to meet the turnaround deadlines.

* * *

Ms. Makl believes her probation extension resulted from a meeting she had with her immediate supervisor, Eileen Gavinski, two days prior to her review. Ms. Makl informed Ms. Gavinski that it was ridiculous for Ms. Gohmann to harass her so much. Ms. Makl requested that Ms. Gavinski talk to Ms. Gohmann in an attempt to resolve this situation. Ms. Gavinski agreed and told Ms. Makl not to worry about it.

In addition, there are some general allegations of a sexist attitude on the part of upper-level management that had a pervasive effect on the working environment:

It was Ms. Makl's perception that Assistant Chancellor Fredrick Leafgren and Dr. Robert Nicholson showed preference to men and made the Division of Student Life a hostile and intimidating work environment for women. The women who worked in the Division endured the hostile work environment and some passed their hostilities on to others, or they left the department.

* * *

Dr. Nicholson and Ms. Gohmann had no concept of how long something would take. They were constantly asking how long something would take and interrupting Ms. Makl's work. If Ms. Makl answered that a document would take about 15-20 minutes to type, she would be asked how come it takes so long, or ask why it took 20 minutes instead of 15 minutes to type it. This was not supervision, it was harassment. Ms. Makl believes it to be a direct result of the treatment that both Dr. Nicholson and Ms. Gohmann were receiving from their superiors in the Division.

* * *

Ms. Makl felt that even though it seemed that her complaints and complaints of others were listened to, they were not responded to. When a group of four secretarial workers (all women) approached Fredrick Leafgren about the working situation, he listened, but the situation did not change. They also did not get results from Mary Williams, Special Assistant to the Chancellor for Affirmative Action, although she listened and seemed to understand the situation.

* * *

It is the claimant's position that a pervasive discriminatory and hostile environment exists in the entire Division of Student Life and that wile professional people, particularly women, were being denied recognition for their achievements, the clerical staff, which was composed entirely of women, were not given any respect at all, but treated as emotional punching bags for their unfortunate superiors who felt just as intimidated and frustrated and trapped as they did.

For the most part, this complaint consists of an undifferentiated litany of the problems Ms. Makl perceived with her work environment, with no specification of how the particular incidents are related to sex discrimination or the the alleged sexist attitudes of higher management. For example, Ms. Makl complains that:

Ms. Makl was requested to type a Chapter 17 Conduct Code from scratch. She had to type it three times on three different software packages because her supervisor, Terri Gohmann did not like the appearance of the print style and format. Ms. Makl presented a rough draft to Ms. Gohmann, who was very upset that it was not perfect the first time and she did not like the way that the computer justified each line. Every time a mistake was made Ms. Makl was ridiculed. Previously, Ms. Makl's work experience, at the Department of Transportation in Green Bay, was to have the person who assigned the work proofread it. She was perfectly willing to do this, but had not been informed that there were different procedures in the Division of Student Life.

One is left to wonder how Ms. Gohmann's alleged handling of this matter could possibly have anything to do with sex discrimination, except to the extent that perhaps this is supposed to be an example of how the clerical staff were "treated as emotional punching bags for their unfortunate superiors who felt just as intimidated and frustrated and trapped as they did."¹

As discussed above, a complaint must be liberally construed and not 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. Complainant has not alleged any facts that even conceivably could give rise to a claim of sex harassment as defined in §111.32(13), Stats.: "unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature." While complainant apparently alleges that she 'was discriminated against because of her sex in the context of a sexist, hostile work environment, she is not alleging that she was subject to either "quid pro quo" sex harassment or conduct of a sexual nature -- e.g., lewd comments, sexual advances, etc. However, if members of management treated her adversely with respect to her conditions of employment, because of her sex, this would be cognizable as a claim of sex discrimination under §§111.322(1) and 111.321, Stats. The adverse conditions of employment alleged in the complaint were perpetuated, with a few exceptions, by female supervisors. Complainant is not alleging that these female supervisors were motivated by an anti-female bias. Rather, she alleges, for example, that she "believes it [their conduct toward her] to be a direct "result of the treatment that both Dr. Nicholson and Ms. Gohmann were receiving from their superiors in the Division," and that: "the clerical staff, which was composed entirely of women, were not given any respect at all, but treated as emotional punching bags for their unfortunate superiors who felt just as intimidated and frustrated and trapped as they did." Assuming that complainant can prove everything she alleges, this frames the question of whether respondent could be liable under the FEA for sex discrimination with respect to actions by complainant's female supervisors that were not taken because of complainant's sex, but were taken in response to sexist actions and

¹ Complainant's brief in opposition to the motion to dismiss makes no attempt to specify how the particular incidents set forth in the complaint amount to sex discrimination beyond arguing that this all fits in to a sexist, misogynist work environment.

attitudes of the supervisors' male supervisors. In the Commission's opinion, if complainant's supervisors were using her as an "emotional punching bag" because they "felt just as intimidated and frustrated and trapped as [complainant] did," this cannot possibly constitute "discriminat[ion] against any individual ... in terms, conditions or privileges of employment ... because of [sex]." §111.322(1), Stats. Under complainant's alleged facts, no one is discriminating against her because of her sex, or because of sex in any way other than in an extended "but for" sense -- i.e., a male supervisor creates a sexist atmosphere with respect to his female subordinate (complainant's supervisor) who then uses complainant as an "emotional punching bag." The chain of legal causation falls apart under these circumstances. This is similar to an attempt to hold the employer liable under the FEA for a discharge which results when a female supervisor is denied a promotion on the basis of sex and fires her female secretary in frustration. As noted above, "[t]he facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted." 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).

The only "harassment" complainant alleges she received from a male member of management was from Dr. Nicholson, Director of Student Conduct.² These allegations are primarily as follows:

While Ms. Makl was working in her office with her door shut Robert Nicholson, Director of Student Conduct, would open the door, walk in without knocking, and throw down what he wanted done, right in the middle of her desk and on top of things she was working on at the time. Dr. Nicholson wanted things done right here and right now for him. If the work wasn't done when he asked for it, he would contact Ms. Gohmann who would then insist that Ms. Makl complete Dr. Nicholson's work, even though she may have been working on something for another supervisor. One time, Dr. Nicholson got upset with Ms. Makl when she was talking with one of the Hall Directors because she was not at her desk, available to immediately do his work. These were additional reasons that Ms. Makl was unable to meet the turnaround deadlines.

² It is not clear from the complaint where Dr. Nicholson was in the hierarchy except that he was not either complainant's first or second line supervisor.

Dr. Nicholson and Ms. Gohmann had no concept of how long something would take. They were constantly asking how long something would take and interrupting Ms. Makl's work. If Ms. Makl answered that a document would take about 15-20 minutes to type, she would be asked how come it takes so long, or ask why it took 20 minutes instead of 15 minutes to type it. This was not supervision, it was harassment. Ms. Makl believes it to be a direct result of the treatment that both Dr. Nicholson and Ms. Gohmann were receiving from their superiors in the Division.

Complainant is not even alleging that Dr. Nicholson, a male supervisor, was harassing her because of her sex, but rather that this was "a direct result of the treatment that both Dr. Nicholson and Ms. Gohmann were receiving from their superiors in the Division." Thus, the charge against Dr. Nicholson suffers from the same defect as the charge against Ms. Gohmann.

This excerpt from the complaint also illustrates in another way the fundamental problem with this claim. Complainant alleges that: "Dr. Nicholson and Ms. Gohmann had no concept of how long something would take. They were constantly asking how long something would take and interrupting [her] work ... This was not supervision, it was harassment." Regardless of how liberally the Commission attempts to construe this complaint, the crux of the matter is that no sex discrimination or sex harassment is being alleged here. Complainant obviously feels that her supervision and treatment, primarily by Ms. Gohmann, were unfair and unreasonable, and constituted "harassment" in a general sense, but this does not make this a sex harassment or sex discrimination case.

Complainant points out in her brief that a UW-SP faculty committee which investigated an internal complaint filed by Cynthia Chelcun, a professional employe in the Division of Student Life, "has already acknowledged a hostile environment under EEOC guidelines." 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. Rather, she alleges that her supervision, primarily by Ms. Gohmann, was unfair and unreasonable "as a direct result of the treatment that both Dr. Nicholson and Ms. Gohmann were receiving from their superiors in the Division," and that the female clerical staff "were not given any respect at all, but treated as emotional punching bags for their unfortunate superiors who felt just as intimidated and frustrated and trapped as they did."

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. Management has no obligation to act if the conditions about which complainant was concerned did not involve discrimination, but rather involved disagreements with her supervisor about her approach to supervision.

In conclusion, to the extent that this complaint purports to be any more than a grievance against Ms. Gohmann's supervision of complainant, it necessarily relies on a legally untenable chain of causation and must be dismissed for failure to state a claim.

ORDER

Respondent's motion to dismiss 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.