

* * * * *

WANITA STRICKER,

Complainant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case Nos. 92-0058-PC-ER
92-0201-PC-ER

* * * * *

*
*
*
*
*
*
*
*
*
*
*
*
*
*

DECISION
AND
ORDER

Nature of the Case

These are complaints of sex discrimination, sexual harassment, and FEA retaliation. A hearing was held on October 21 and 22, 1993, before Laurie R. McCallum, Chairperson. The parties were permitted to file briefs and the final brief was filed on January 11, 1994.

Findings of Fact

1. At all times relevant to this matter, complainant, a female, has served as a correctional Officer at Oakhill Correctional Institution and has been assigned to the P-10 post, under the direct supervision of Thomas Laliberte, the first shift Captain.

2. During the relevant time period, the post orders for the P-10 post stated that the P-10 officer would staff the switchboard/reception area in the administration building until 8:30 a.m.; that, at 8:30 a.m., this duty would be assumed by a Clerical Assistant, and the P-10 officer would proceed to Cottage 1; and that, at 9:00 a.m., the P-10 officer would leave the institution to deliver/pick up mail and/or inmates from designated sites.

3. During the relevant time period, this Clerical Assistant position was held by Karen Showers whose work hours were 8:30 a.m. - 5:00 p.m. Ms. Showers was responsible for supervising cleaning and other janitorial activities of certain inmates in the administration building and, as a result, the first thing she did most days upon reporting at 8:30 a.m., was to go to the

basement of the administration building to check on the activities of these inmates. As a result, she rarely reported to the switchboard/reception area until after 8:30 a.m.

4. Complainant's practice was to wait until Ms. Showers reported to the switchboard/reception area, visit the bathroom in the administration building for several minutes, walk to Cottage 1, and report to the mail room in Cottage 1. Complainant regularly reported to Cottage 1 after 8:45 a.m.

5. Certain Officers assigned to the mail room in Cottage 1 on the first shift complained to Captain Laliberte that complainant, on a regular basis, was not reporting to Cottage 1 until after 8:45 a.m. Captain Laliberte did not receive similar complaints about other Officers assigned to the P-10 post.

6. As a result of these complaints, Captain Laliberte began to monitor the timeliness of complainant's reporting to Cottage 1 more closely. Captain Laliberte observed that complainant, on a regular basis, reported to Cottage 1 after 8:45 a.m. Captain Laliberte also observed that complainant was the only P-10 officer to report to Cottage 1, on a regular basis, after 8:45 a.m. After observing this, Captain Laliberte counselled complainant to report to Cottage 1 on or before 8:45 a.m.

7. After this counselling, Captain Laliberte called the switchboard on several occasions when complainant had not reported to Cottage 1 by 8:45 a.m. to determine her whereabouts. These calls were not frequent. Captain Laliberte also called the switchboard on one occasion when Officer Sieckert, a male who was assigned to the P-10 post that day, had not reported in a timely manner to Cottage 1.

8. Captain Laliberte also counselled complainant to call him when Ms. Showers did not report in a timely manner to the switchboard/reception area. Complainant, although she did this on a few occasions, was hesitant to use this approach because she didn't want to get Ms. Showers in trouble. Other Officers assigned to the P-10 post called Captain Laliberte to report that Ms. Showers had not reported in a timely manner.

9. During the relevant time period, Captain Laliberte was not Ms. Showers' supervisor.

10. The staff person assigned to the switchboard/reception area is responsible for screening and directing calls and visitors to the institution. The switchboard area can be locked and the switchboard placed on night call if the staff person needs to leave the area. This has been done by complainant

and by other Officers assigned to the P-10 post. Placing the switchboard on night call after 8:30 a.m. would result in reduced telephone service to certain areas of the institution. Complainant was not instructed by any of her superiors to remain at the switchboard until Ms. Showers reported there.

11. Some time in late February of 1992, Captain Laliberte called the switchboard after 8:45 a.m. and complainant answered the call. Captain Laliberte ordered complainant to locate Ms. Showers, advise her she was leaving, and report to Cottage 1 immediately. Captain Laliberte ordered complainant to "Get over here now." Complainant did not comply with this order. Complainant's explanation for her failure to comply was her feeling that leaving the switchboard/reception area would have created a security risk for the institution.

12. On or around February 28, 1992, Captain Laliberte observed complainant approaching Cottage 1 at 8:55 a.m. and stated to her, "Nice of you to come over at 5 to 9. Get in there now." Captain Laliberte has used the same approach and tone with male Officers Thompson, Mattie, and Blaschka.

13. On or around March 9, 1992, Captain Laliberte called the switchboard after 8:45 a.m. and complainant answered the call. Captain Laliberte ordered complainant to "get over here--come home." Complainant answered that it was Cottage 1, "not home." Captain Laliberte again ordered her to "come home" and explained that it was the "home of security." Complainant did not comply with the order but instead asked to meet with management. Captain Laliberte has referred to the security area as "home" to other Officers.

14. In May of 1991, complainant was directed to fill the warden's car with gas. This was part of the P-10 post assignment and was routinely done by male and female P-10 officers.

15. In 1991, part of the P-10 officer's mail run was picking up boxes from respondent's stores unit. The stores unit, when packing these boxes, kept the weight under 50 pounds. Once complainant brought to their attention that some of the boxes were too heavy for her to lift, the stores unit limited the weight of a box to 30 pounds. Complainant also requested that the boxes be left on the dock and this request was granted. The stores unit made available to customers 2-wheel and 4-wheel carts to assist them in moving boxes. The largest order for Oakhill Correctional Institution in 1991 consisted of 7 boxes and weighed a total of 268 pounds. Both male and female P-10 officers were responsible for picking up these boxes. Complainant never advised Captain

Laliberte or any other supervisor that she had a physician-imposed lifting restriction.

16. In May of 1991, Warden Catherine Farrey and Administrative Captain David Lemke agreed that complainant should be temporarily reassigned from the P-10 post to the supervision of inmates engaged in an institution-wide cleaning. The reason for this reassignment was their opinion that complainant did a very effective job in supervising cleaning by inmates. This reassignment was not recommended or effected by Captain Laliberte. On days when complainant was not assigned to work, this duty was either not carried out or was carried out by male Officers. Complainant expressed to other staff that she was pleased that her success in supervising inmates had been recognized through this assignment.

17. Early in March of 1992, Captain Laliberte advised complainant, before she left for the mail run, that a call had been received from the Huber Center that certain items in their possession were needed by a female inmate of the Dane County Jail; and that he wanted complainant to obtain these items at the Huber Center, which was a regular stop on the mail run, and deliver them to the Dane County Jail. When complainant arrived at the Huber Center, no one on duty there knew anything about the call or the items. Complainant called Captain Laliberte and he told her he would try to get more information and would call her back. Captain Laliberte did call complainant back; told her that no one at Oakhill had any additional information; and directed her to do some checking to "find something" and effect the delivery. Complainant was not able to determine what needed to be delivered or to whom.

18. Early in March of 1992, complainant had not reported to Cottage 1 by 8:45 a.m., so Captain Laliberte called the switchboard and told Ms. Showers, who had answered the call, to locate complainant and direct her to report to Cottage 1. When complainant reported to Captain Laliberte, he directed her to call the Poison Control Center for purposes of trying to identify some pills that had been discovered in the possession of an inmate and, once they were identified, to prepare an incident report relating to the pills. Both male and female Officers have been directed to contact the Poison Control Center under similar circumstances.

19. Early in March of 1992, Captain Laliberte stated to a group of Officers, including complainant, "Has anybody ever told Wanita Stricker she's

looking through rose-colored glasses?" The glasses complainant was wearing that day had a pink tint.

20. In an evaluation of complainant's performance completed on or around July 27, 1992, Captain Laliberte indicated that "there has been some concern about her returning to cottage one from ADM in a timely fashion," and "there are times when Officer Stricker should be more timely in doing some of her assignments."

21. In September of 1992, Captain Laliberte contacted complainant and directed her to escort an inmate to a hospital appointment. Complainant told Captain Laliberte that she would not be able to carry out this assignment because it would require working past the end of her shift. Captain Laliberte directed complainant to find an Officer to take her place in carrying out the assignment. Complainant asked Captain Laliberte, "Isn't that your job?" Complainant then advised Captain Laliberte that the reason she couldn't carry out the assignment was that she had a physician's appointment scheduled after her shift. Captain Laliberte found a male Officer to carry out the assignment. Both male and female Officers have been assigned escort duty late in their shift which would require them to work past the end of their shift, and the standard practice is for the Officer, not the Captain, to find a replacement if they are unable to carry out the assignment unless the unavailability results from a scheduled physician's appointment, in which case the Captain usually locates the replacement.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden to show that she was discriminated against or harassed on the basis of her sex or retaliated against for engaging in activities protected by the Fair Employment Act.
3. The complainant has failed to sustain this burden.

Opinion

The issues to be decided here are as follows:

Case No. 92-0058-PC-ER:

Whether complainant was discriminated against on the basis of her sex as alleged in her complaint [filed March 12, 1992].

Case No. 92-0201-PC-ER:

(1) Whether respondent discriminated against complainant on the basis of sex in the terms and conditions of employment by making negative statements on her evaluation in July of 1992.

(2) Whether respondent retaliated against the complainant for activities protected by the Fair Employment Act when negative comments were made on complainant's July of 1992 performance evaluation.

Case No. 92-0058-PC-ER

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

In order to establish a prima facie case of discrimination in relation to terms and conditions of employment as alleged here, the complainant would have to show that (1) she is a member of a protected group; (2) she suffered an adverse term or condition of employment; and (3) the adverse term or condition exists under circumstances which give rise to an inference of discrimination.

Complainant, as a female, is a member of a group protected by the Fair Employment (FEA). It is a stretch, however, in view of the record in this case, to conclude that complainant suffered an adverse term or condition of employment which gives rise to an inference of discrimination. First of all, complainant has failed to show how her supervisor's directives to comply with her post orders, or to carry out duties normally assigned to her post or to

Officer positions in general; or how a facially innocuous reference to her "rose-colored glasses," would constitute adverse terms or conditions of employment. It must be inferred then that it is the manner in which Captain Laliberte has communicated these directives, assignments, or comments with which complainant is taking issue here. However, the record is replete with testimony that the manner in which Captain Laliberte has communicated with complainant is consistent with the manner in which he communicates with other Officers, male and female. The Commission concludes that complainant has failed to show a prima facie case of sex discrimination here.

If complainant had been successful in demonstrating a prima facie case, the burden would shift to respondent to articulate legitimate, non-discriminatory reasons for its actions. In this regard, respondent has articulated that the duties complainant was assigned to perform were duties routinely assigned to other Officers, male and female; that the expectations for complainant's performance of these duties and the standards applied to her performance of these duties were consistent with the expectations and standards imposed on other Officers, male and female; that Captain Laliberte did not communicate differently with complainant in trying to direct and motivate her than he did with other Officers, male and female, in similar situations; that the rose-colored glasses comment was innocuous and intended to be a friendly gesture; and that the cleaning assignment was not onerous or demeaning but was intended to be an acknowledgement of complainant's skill in supervising the cleaning activities of inmates. These reasons are legitimate and non-discriminatory on their face.

The burden then shifts to complainant to demonstrate pretext. In regard to the issue relating to her failure to report to Cottage 1 in a timely manner, the record shows that complainant was the only P-10 officer to regularly report to Cottage 1 after 8:45 a.m.; that Captain Laliberte made it very clear to complainant what his expectations in this regard were; that, despite this, complainant continued to report to Cottage 1 after 8:45 a.m.; and that Captain Laliberte used a very direct and directory communication style, consistent with the style he had used with male Officers he was trying to motivate, in an attempt to get complainant to comply with his orders in this regard. Complainant has failed to show that it was not possible or practical for her to comply with Captain Laliberte's order, i.e., she failed on most of these occasions to call Captain Laliberte to inform him when Ms. Showers was late in

relieving her and she failed on most of these occasions to put the switchboard on night call when Ms. Showers was late; has failed to show that Captain Laliberte dealt with her in a more harsh or abusive style than he employed in dealing with male Officers in similar situations; and, as a result, has failed to demonstrate pretext.

In regard to complainant being directed to fill the warden's car with gas, the record shows that this was a routine part of the P-10 officer's responsibilities and had been carried out by both male and female Officers. In regard to complainant being directed to call the Poison Control Center and fill out an incident report based on the results of the call, the record shows that many Officers, both male and female, have been assigned this responsibility. Complainant has failed to demonstrate pretext in regard to these assignments.

In regard to complainant having to pick up heavy boxes, the record indicates that this was a routine part of the P-10 officer's responsibilities and had been carried out by both male and female Officers; that, once the stores unit became aware that complainant was having trouble lifting certain boxes, the maximum weight of a box was reduced to 30 pounds; that, once the stores unit was asked by complainant to place the boxes on the dock, this was done; and that complainant never advised Captain Laliberte or any other supervisor that she had a lifting restriction. Complainant has failed to show that she was treated differently based on her sex and has failed to show pretext.

The point that complainant is trying to make in regard to the cleaning assignment is not clear. Complainant does not appear to assert that this was an undesirable assignment or that she was singled out for this assignment on any basis other than her skill in supervising inmates engaged in cleaning tasks. Complainant appears to assert that, because there were some days during her absences when this task was not assigned to another Officer, this somehow constituted an adverse term or condition of her employment. The connection here is not an obvious or even discernible one. It should also be noted here that the record indicates that Captain Laliberte was not involved in assigning complainant to this task; that, although he was involved in assigning Officers to this task during her absences, factors such as availability of cleaning supplies and equipment and availability of Officers prevented the cleaning tasks from being completed on certain days; and that male Officers were assigned to this task by Captain Laliberte during complainant's absence. Complainant has failed to demonstrate pretext.

In regard to the Huber Center incident, the record shows that Captain Laliberte communicated to complainant all the information that he possessed relating to the request; and that he expected her, as an experienced Officer and a reasonably intelligent person, to try to determine from staff at the Huber Center and the Dane County Jail what needed to be delivered and to whom. Complainant has failed to show or to allege that Captain Laliberte had information which he did not share with her, that it was unreasonable of him to expect that she should exercise her discretion to try to obtain the relevant information and to take appropriate action based on that information, or that he treated her in a demeaning or abusive manner in communicating with her in this regard. Complainant has failed to demonstrate pretext.

In regard to the "rose-colored glasses" comment, complainant has failed to show that this comment was unwelcome, was stated in other than a friendly manner, was in any manner sexually suggestive or offensive or suggestive or offensive in any other way, or that a reasonable female would interpret it as demeaning or condescending. Complainant has failed to demonstrate pretext.

In regard to the directive from Captain Laliberte late in her shift that she escort an inmate to the hospital, complainant has failed to show that this was an unusual directive for an Officer to receive, that male Officers were not given similar directives, and that it was not standard procedure for an Officer to find his or her replacement if unable to carry out such a directive. The record also shows that, once complainant advised Captain Laliberte that she could not take the assignment because of a scheduled physician's appointment, Captain Laliberte followed standard procedure and assigned another Officer (male) to the task. Complainant has failed to demonstrate pretext in this regard.

Complainant also alleges that the manner in which Captain Laliberte interacted with her in regard to the above-described incidents constitutes harassment based on her sex. In Zabkowicz v. West Bend Co., 589 F. Supp. 70, 38 FEP Cases 610 (1984), the court held that, in order to prevail on a Title VII claim based on sexual harassment, a plaintiff must show that (1) she is a member of a protected class, (2) she was subjected to unwelcome verbal or physical conduct of a sexual nature, (3) but for her sex, she would not have been subjected to the sexual conduct, (4) the sexual conduct was sufficiently severe or pervasive that it unnecessarily interfered with her work performance or created an intimidating, hostile or offensive working environment, and (5) the employer

knew or should have known of the harassment but failed to take immediate and appropriate corrective action. The court also held that the elements of a sexual harassment claim under Title VII are also the elements of a similar claim under the Wisconsin Fair Employment Act, §§111.32(13) and 111.366, Stats. In a recent decision, Harris v. Forklift Systems, Inc., 62 EPD 42,623 (1993), the U.S. Supreme Court stated that all circumstances must be examined in deciding whether a work environment is abusive or hostile; for a violation to exist, there must exist discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to create an abusive working environment; and that the environment must be hostile or abusive based on both the objective perception of a reasonable person and the subjective perception of the alleged victim.

It is apparent from the record that the statements made by Captain Laliberte at issue here were gender-neutral; were not sexually offensive or suggestive; were phrased and delivered in a manner consistent with that utilized by Captain Laliberte to order and motivate other male and female Officers; were not intended to ridicule or insult or abuse complainant but to make it clear to her that her supervisor expected her to carry out the elements of her job in the required manner; and would not, applying a reasonable person standard, be regarded as discriminatory statements of ridicule, insult, or abuse. The Commission concludes that the record does not show that Captain Laliberte's supervision of complainant created for her the type of hostile, abusive, or offensive work environment required to demonstrate sexual harassment.

Case No. 92-0201-PC-ER

The issue here relates solely to the evaluation of complainant's performance completed by Captain Laliberte in July of 1992. The negative comments in this evaluation (See Finding of Fact 21, above) were that "there has been some concern about her returning to cottage one from ADM in a timely fashion" and that "there are times when Officer Stricker should be more timely in doing some of her assignments." As concluded above, the record shows that complainant's P-10 post orders provided that she leave the switchboard/reception area in the administration building at 8:30 a.m. and proceed to Cottage 1; that complainant was the only P-10 Officer who

consistently failed to report to Cottage 1 until after 8:45 a.m.; that, despite the fact that Captain Laliberte made it clear to complainant that this was unsatisfactory and suggested to her ways in which this could be accomplished, she continued to consistently report to Cottage 1 after 8:45 a.m; and that complainant failed to show that it was not possible or practicable for her to report to Cottage 1 by 8:45 a.m., i.e., she failed to consistently follow the practice of putting the switchboard on night call or to consistently follow Captain Laliberte's suggestion that she call him and receive instructions if Ms. Showers reported late to the switchboard. It is obvious that the statements in the performance evaluation were an accurate reflection of complainant's failure to meet clearly established performance expectations. The Commission finds no pretext here and concludes that complainant has failed to demonstrate discrimination or retaliation in this regard.

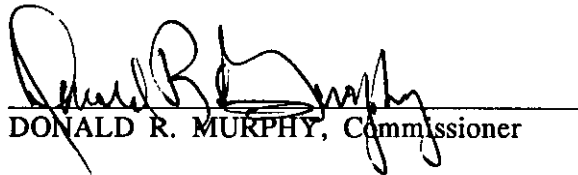
Order


These complaints are dismissed.

Dated: March 31, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Wanita Stricker
2210 Schroeder Lane
Stoughton, WI 53589

Michael Sullivan
Secretary, DOC
PO Box 7925
Madison, WI 53707-7925

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.)