

STATE OF WISCONSIN

PERSONNEL COMMISSION

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PATRICIA ERDMANN, *

Complainant, *

v. *

President, UNIVERSITY OF *

WISCONSIN SYSTEM (Stevens Point), *

Respondent. *

Case No. 92-0104-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 upon which relief can be granted. The parties have filed briefs.

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 60 (1979) (citations omitted); affirmed, Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

This is a complaint of age and sex discrimination. Complainant alleges that she served as secretary to the UW-SP chancellor until her retirement on January 7, 1992. She alleges, in summary, that the chancellor carried on an affair with a woman (not a UW-SP employee), and that his activities in connection with this affair had a negative impact on her, which is more or less summarized in her complaint as follows:

The position I was put in by these activities put a strain on my professional and personal life. I was disgusted by the chancellor's

behavior and the role I was expected to play in order for the Chancellor to maintain his affair in secret.

Complainant asserts there were many occasions when she "was used to cover up for Dr. Sanders and I was asked to lie to other people about where Dr. Sanders was." She further alleges that: "I got tired of making excuses for Dr. Sanders, canceling meetings, and covering for him when he was late for meetings. These duties reflected negatively on me because it appeared I was not a good manager of the office as far as scheduling the Chancellor's time." Finally, she alleges:

I felt it was inconsiderate for the Chancellor to put me in the position of having to cover up for him and to keep his affair secret ... I would have continued to work at the University of Wisconsin Stevens Point if Dr. Sanders would not have put me in the position of justifying his whereabouts and covering up for him. I could not work for someone I did not respect. I had serious doubts about the ability of Dr. Sanders to run a university when he could not manage his personal life. After Dr. Sanders became Chancellor there was a lot of turmoil in the office with everyone, not just me. Several people were very upset with the way he handled matters and he did nothing to reduce the tension in the office.

13. Because I was forced to perform duties that were repugnant to me I was forced to leave the University. Therefore, my early retirement from the University of Wisconsin Stevens Point was a de facto termination and not a voluntary event. This is in direct violation of the Age Discrimination Employment Act.

This motion raises the question of whether, if the commission accepts at face value all of the allegations in the complaint in keeping with the Phillips decision, the complaint conceivably states a claim under the FEA (Fair Employment Act) of either sex or age discrimination.

In her brief in opposition to the motion to dismiss, complainant contends that her complaint states a claim of sex harassment. Section 111.32(13), Stats., defines sex harassment as:

[U]nwelcome 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.

Even assuming all of the facts alleged in the complaint, it does not give rise to a claim of sexual harassment. Complainant does not allege there were any kind of "quid pro quo" sexual favors situation involved. The only thing that even conceivably could fit within the statutory definition of sexual harassment would be the allegation that: "the cards [from the chancellor's lover] kept coming and got more explicit and vulgar." Complainant attached copies of these documents to her complaint. In the Commission's opinion, on these facts there was not, as a matter of law, a "deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes," §111.32(13). The Commission will assume that complainant was required to open the Chancellor's personal correspondence. However, it is obvious that she did not have to peruse the material she found vulgar and offensive. This is a somewhat different situation from the perhaps more typical sexual harassment case where, for example, graphic pictures are posted on a bulletin board in a common area. Furthermore, even assuming complainant was necessarily exposed to the entirety of these documents, there are only two one-page typewritten documents -- one entitled "The Dieter's Guide to Weight Loss During Sex," and the other, an excerpt from "Bull Durham" -- that conceivably fall within the category of "offensive sexually graphic materials." §111.32(13). Assuming, arguendo, that these documents indeed meet this statutory definition, exposure to a few offensive documents while opening the chancellor's personal mail as a matter of law falls far short of a "deliberate, repeated display of offensive sexually graphic materials." *id.* (emphasis added), which is required to state a claim for sexual harassment.

Complainant's brief cites King v. Palmer, 778 F. 2d 878, 39 FEP Cases 877 (D.C. Cir. 1985), as a case "where a sexual relationship between a supervisor and co-worker subjected the complainant to a discriminatory work environment and resulted in her not obtaining a promotion." Unlike the King case, the chancellor's relationship was not with a co-worker and did not result in a negative personnel transaction, such as the denial of a promotion, because of favoritism to a co-employee. Furthermore, contrary to complainant's contention, neither the Court of Appeals nor the District Court addressed the merits of the discriminatory work environment part of the case.

With respect to her age discrimination claim, while complainant is in the protected age category, there is absolutely nothing in her complaint or her brief that alleges that she was treated in a negative manner, or different

from any other employe, because of her age. Taking her complaint at face value, what it involves is an allegation that her boss made use of his office to facilitate an affair (with a person who was not a UW-SP employe), and that in so doing, he treated complainant inconsiderately by making her cover for him, requiring her to lie about his whereabouts, etc., and that her working conditions became so unpalatable to her that she was forced to take early retirement. While she alleges in a conclusory fashion that she was the victim of age discrimination, there is no allegation of any kind that the chancellor took the alleged actions -- i.e., "asked [complainant] to lie to other people about where [he] was," or required her to make excuses for him, to cancel meetings, etc., because of complainant's age.

In her brief in opposition to the motion to dismiss, complainant attempts to argue that she has a prima facie case under a McDonnell Douglas framework.¹ However, she is using a framework (for a discharge) that is not appropriate for this kind of case, which involves adverse conditions of employment. Complainant's asserted prima facie case is that she is in the protected age category, she was performing her job satisfactorily, she was subjected to adverse treatment (regarding having to cover up for the chancellor, etc.), and she was replaced by a younger person. While this would establish a prima facie case if the adverse treatment had been a discharge, this is not the case here. That complainant was replaced by a younger person after she retired does nothing to create an inference that the chancellor's motivation in requiring her to cover up for him in connection with his affair was motivated by her age.

Complainant's allegation of constructive discharge does nothing to salvage her age claim. In her complaint, she alleges that "[b]ecause I was forced to perform duties that were repugnant to me I was forced to leave the University." Assuming the truth of this allegation, the "forced" retirement cannot be attributed to her age unless there is an allegation that the Chancellor required her "to perform duties that were repugnant to [her]" because of her age. There has been no such allegation.²

¹ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973).

² These comments could also be made with respect to her sex 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 23, 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.