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JEAN SINDORF,
 Complainant,

v.

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

Case No. 92-0105-PC-ER

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RULING
 ON
 MOTION
 TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for untimely filing and 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 & 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 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. The complaint, filed May 7, 1992, alleges that complainant was employed at UW-SP as secretary to the Faculty Senate until her retirement on January 3, 1991, and that after that she was re-employed in this job as a limited term employe (LTE) for an unspecified period of approximately six months.¹

¹ Although this is not set forth in the complaint, documents submitted with complainant's brief in opposition to the motion show that she was so employed at least as of September 7, 1991.

The gravamen of the complaint has to do with an affair allegedly carried on by Chancellor Sanders with a woman who was not a UW-SP employe. Complainant makes several allegations about how this impacted on a co-employe, Patricia Erdmann, who was the chancellor's secretary and complainant's best friend at UW-SP.² Complainant alleges that Ms. Erdmann was forced to cover up for the chancellor, was exposed to vulgar correspondence, etc., and that:

4. ... Eventually, because this disturbed Ms. Erdmann so much, she confided in me. We were appalled at Dr. Sander's behavior and were disgusted at the role we were being forced to play in his deception.

5. Because of the Chancellor's behavior, I was forced to work in a hostile environment. I knew of the Chancellor's activities, but felt I had to remain silent to protect my job and Ms. Erdmann's position. I was close to retirement and did not want to jeopardize my pension benefits. Working in this environment was the equivalent of having to work in an environment where pictures of nude women were on display. It was demeaning.

The complaint alleges only two direct interactions between complainant and the chancellor. The first is that after he arrived in 1989, she took a telephone message for him from the woman with whom, she soon learned, he was having an affair. The other allegation is as follows:

6. When the Chancellor had been at the University for a year and a half, a major reshuffling of office space took place in the Chancellor's complex. My office, which had been there for seven years and which was a pleasant environment with adequate space for my equipment, was allocated to the University Relations Department. I was asked to work in a former broom closet. When I protested to [sic] this location, an area in the Academic Affairs office was assigned to me. At this point I resigned, taking early retirement instead of enduring both the hostility of the environment and treatment which was uncalled for and unnecessary after my long years of dedicated service.

7. I was assigned a different office in order to get my work space away from Ms. Erdmann's so that it would be more difficult for us to meet. Chancellor Sanders was aware that I knew of his affair and that I discussed it with Ms. Erdmann.

8. I was assigned a "dungeon" for an office in an effort to force me into taking early retirement. Therefore, my early retirement was a de facto termination and not a voluntary event. This is in direct violation of the Age Discrimination Employment Act.

² Ms. Erdmann also filed a complaint of sex and age discrimination in connection with the chancellor's alleged affair, Case No. 92-0104-PC-ER.

The Commission will first address the timeliness issue. Pursuant to §111.39(1), Stats., a complaint must be filed within "300 days after the alleged discrimination ... occurred." The complaint was filed on May 7, 1992, which is more than 300 days after complainant's retirement on January 3, 1991, so on its face it appears to be untimely. Complainant asserts that this time limit is not jurisdictional in nature, and this is not in dispute. Milwaukee Co. v. LIRC, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App. 1983). Therefore, it is subject to waiver, tolling, etc.

Complainant in her brief asserts that the complaint is timely because it "was filed within 300 days of the discovery on the part of Ms. Sindorf of the sexual discrimination against her." There is no elucidation of what is meant by "the discovery on the part of Ms. Sindorf of the sexual discrimination against her." This assertion is inconsistent with the earlier statement in the "facts" section of this brief that:

Complainant was prepared to file a complaint concerning all of these matters following her retirement but she feared that there would be repercussions concerning Ms. Erdmann and that it might effect [sic] her employment at the University. When Ms. Erdmann was also the subject of a de facto termination on January 7, 1992, she sought Legal Counsel and began the process of initiating this complaint against the University.³

Furthermore, complainant has not identified any facts involving the alleged discrimination of which she was not aware at the time she retired. Therefore, there is absolutely no basis upon which the Commission could reach a conclusion that complainant "discovered," in any legally meaningful way, the sexual discrimination against her within 300 days of the filing of her complaint.

It is unclear whether complainant is contending that she should be excused from the timely filing requirement because she was afraid of retaliation against Ms. Erdmann.⁴ In any event, there is no authority for this proposition. See Crandall v. Prudential Ins. Co., 48 FEP Cases 1400, 1410 (D.N.J.

³ This paragraph is essentially the same as the last paragraph in the complaint.

⁴ As noted above, there is a reference to concern about repercussions against Ms. Erdmann in the complaint and the "facts" section of the brief, but complainant does not argue this point in her brief.

1988) (filing period under Title VII not tolled by complainant's fear of retaliation against spouse).

Finally, complainant contends that her complaint is timely because she was employed at UW-SP during the first week of September 1991 in an LTE capacity with the Faculty Senate Department, which was within 300 days of the filing date. However, she has not alleged that the discrimination continued during her period of employment as an LTE.⁵

Even if this complaint had been timely filed, it fails to state a claim of age or sex discrimination under the FEA (Fair Employment Act).

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 when 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 was any kind of "quid pro quo" sexual favors situation involved. Unlike Ms. Erdmann, she does not even allege that she was required to open the chancellor's personal mail which allegedly included lewd correspondence from his lover.

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 claim.

⁵ Such an allegation apparently would be inconsistent with the assertion in the complaint that the work location of this job had been changed from the chancellor's complex to Academic Affairs.

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 the chancellor subjected her friend to inconsiderate treatment in connection with his affair (with a person who was not a UW-SP employe), and that when he found out complainant knew about the affair he reassigned her to a less desirable office (although this assignment apparently was countermanded when she complained about it). 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 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.⁶ However, she is using a framework (for a discharge) which is not appropriate for this kind of case, involving 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 (primarily the reassignment of her office), 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 to reassign her office was motivated by her age.⁷

Complainant's allegation of constructive discharge does nothing to salvage her age claim. In her complaint, she alleges that she was "assigned to a 'dungeon' for an office in an effort to force me into taking early retirement." Assuming the truth of this allegation, the "forced" retirement cannot be attributed to her age unless there is an allegation that the Chancellor acted as he did because of her age. There has been no such allegation.⁸

⁶ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973).

⁷ In fact, she asserts in her complaint that the reassignment was "in order to get my work space away from Ms. Erdmann's."

⁸ 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 as untimely filed and for failure to state a claim upon which relief can be granted.

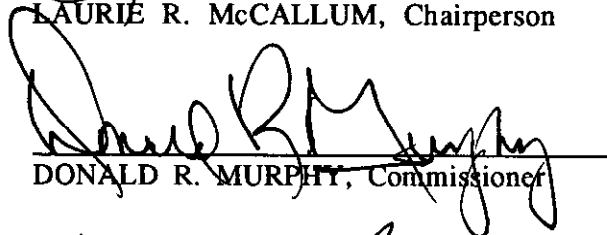
Dated: April 23, 1993

STATE PERSONNEL COMMISSION

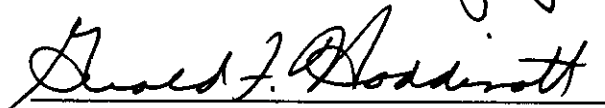


LAURIE R. McCALLUM, Chairperson

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.