

Helmkamp's first-line supervisor was Paul Evans, Assistant Director for Student Affairs, who reported to Norm Sunstad, Director of University Housing.

2. The position description for the House Fellow positions at the University of Wisconsin-Madison (UW-Mad) generally indicates that House Fellows are responsible for enforcing UW-Mad policies and procedures in their assigned hall and serving as a resource and role model for hall residents.

3. As part of their training, House Fellows, including complainant, were provided with written performance expectations and UW-Mad policies. These written performance expectations listed certain acts and indicated that these acts, "if committed by a House Fellow, are considered serious enough to warrant dismissal from the position." These acts included, but were not limited to, the following"

Violation of Residence Halls or University regulations or policies.

Failure to advise a Student Affairs Coordinator of overnight absences from the hall or absence from the Madison area.

Acts of negligence or incompetence that cast reasonable doubt on the likelihood of satisfactory job performance.

4. These written expectations also detailed the policy relating to the personal use of alcohol and other drugs by House Fellows. This policy stated as follows, in pertinent part:

Violation of state or federal laws, University and/or University Housing regulations and/or on University or University Housing property are considered serious enough to warrant dismissal from the position. Some examples are listed below, but they are not intended to be every possible example of this policy. They merely are examples to further elaborate on the policy statements.

A. Furnishing alcohol to an underage resident, guest, visitor, or staff member or consuming alcohol with underage individual(s) on University or University Housing property.

B. Possession, use, or sale of illegal drugs, including marijuana on University or University Housing property.

C. Underage staff consuming or possessing alcohol on University or University Housing property.

5. These written expectations also explained the responsibility of House Fellows for house funds as follows, in pertinent part:

After the election of a treasurer, the House Fellow assumes an advisory role in the use of house funds. As an advisor, the House Fellow should encourage long-range budget planning, comparison shopping, and the expenditure of large sums only for events or purchases which benefit a large number of the residents. The House Fellow is also responsible to insure that house funds are used only for the allocated purposes, and only for legal activities. . . .

. . . the House Fellow may NOT sign for an expenditure which is illegal, such as the use of house funds for gambling or the purchase of alcohol, or for monies to be used for private purposes.

6. The House Fellows also received training relating to the policies governing organizing and attending house events on and off campus and organizing and attending non-house events. Written examples of whether certain described activities comported with these policies were provided to the House Fellows and these examples included the following:

. . . IT IS NOT A FORMAL HOUSE EVENT, SIMPLY A GROUP OF RESIDENTS GOING OUT TO THE BARS AND I KNOW THAT UNDERAGE RESIDENT(S) ARE ALSO GOING AND THEY WILL DRINK, SHOULD I GO?

First, it is important to understand that no House Fellow should ever organize, even informally, such an activity. Simply participating (going along) also can have some negative consequences. Again it goes back to what was previously said, House Fellows are always House Fellows when they are with their residents, regardless of the location. It may become difficult to enforce the alcohol policy in the halls while at the same time participating in the same conduct off campus with those same residents. You may want to discuss with underage residents the uncomfortable position it puts you in when you go out together and they drink alcohol.

7. In the fall of 1991, Ms. Huhn received several complaints from residents of Dawe House and from another House Fellow in Waters Hall relating to the performance of complainant as a House Fellow. These complaints concerned complainant's approachability, her insensitivity to issues of race and homosexuality, and the questionable legality of certain of her activities. Ms. Huhn discussed with complainant at their regularly scheduled biweekly meetings those complaints for which there was not a request for

confidentiality. It was not typical to receive either this volume or these types of complaints regarding a House Fellow, male or female.

8. On or before October 31, 1991, complainant and certain Waters Hall residents became aware of a rumor that a mass murder would occur at a dormitory on a large university campus. When it was brought to complainant's attention that certain of these residents had become very fearful as the result of this rumor, she attempted to obtain additional information. When her father reported to her that he had read a news account that stated that the campus on which this mass murder was rumored to going to occur was on the east coast, complainant sought to confirm this and contacted the Milwaukee Journal and Milwaukee Sentinel. As a result of this contact, the Milwaukee Journal reported in an article published on October 31, 1991, certain statements which were attributed to complainant. This article identified and correctly spelled complainant's name and indicated that she was a "residents assistant" at Elizabeth Waters Hall. Complainant testified at hearing that she gave the newspaper staff person to whom she spoke her name but did not identify her position with the UW-Mad. When Ms. Huhn arrived at her office after this article was published, she had several messages to return phone calls from media representatives. When she returned the first of these calls, she learned of the article and the attribution of certain statements to complainant in the article. When Ms. Huhn later discussed this matter with complainant, Ms. Huhn counselled complainant that it had been inappropriate for her to contact the media without first discussing the matter with her supervisor and without following standard UW-Mad procedure. After this conversation, complainant called and left messages for Ms. Helmkamp, Mr. Evans, and Mr. Sunstad to return her call. When Mr. Evans returned complainant's call, he told her that he was very concerned that she would contact the media directly, that there was a very limited group of individuals at UW-Mad Housing who performed this function, that the standard procedure was to discuss the matter with supervisory staff and with the UW-Mad Press Services office before contact was made, and that this policy applied to all UW-Mad Housing employees, including him. Complainant then asked Mr. Evans what would happen if she did not follow this policy and contacted the media directly again. Mr. Evans was surprised by her insistence in regard to this issue and indicated that job action could result. Complainant was not disciplined for her actions in regard to this incident.

9. During a staff meeting the first week of November of 1991, Waters Hall House Fellows, including complainant, were instructed by Mr. Evans not to participate in any off-campus activities with residents.

10. On November 22, 1991, complainant wrote check #707 on the Dawe House checking account for five dollars as a refundable deposit relating to the rental of a VCR. This check was written in pencil and it was returned to complainant when the VCR was returned to the business from which it was rented.

11. On November 25, 1991, complainant traveled to the University of Wisconsin-Whitewater with two Waters hall residents and with Beth, a non-resident. After arriving in Whitewater, Beth, who had driven, decided that she was going to spend the night in Whitewater and would not be returning to Madison until the next day. Complainant obtained a ride back to Madison but the two residents decided to stay in Whitewater. Complainant had the Dawe House checkbook with her and wrote a check for \$50 from the Dawe House account to one of these residents before she returned to Madison. Complainant used check #707 for this purpose, erasing the pencil entries that had previously been made on this check. Complainant did not notify Ms. Huhn of this trip to Whitewater either prior to or subsequent to her return.

12. Complainant prepared a balance sheet on or around December 1 or 2, 1991, detailing activity in the Dawe House account for November of 1991. On this balance sheet, complainant indicated that check #707 had been used for a \$5 deposit for a VCR.

13. Some time prior to November 26, 1991, certain Waters Hall House Fellows planned a "round robin staff social" to be held on November 26, 1991. Ms. Huhn was invited to attend this round robin which involved going to different rooms in Waters Hall for different courses of the evening meal. Certain of the House Fellows, including complainant, also planned a post-round robin party in complainant's room to which Ms. Huhn was not invited and of which she was not aware at the time. The planning for this party included a decision to serve alcoholic beverages and, as a result, complainant purchased, on the afternoon of November 26, a bottle of tequila and a bottle of rum as well as non-alcoholic ingredients, with money contributed by complainant and other House Fellows. Complainant also planned to use and did use other non-alcoholic ingredients which had been purchased with Dawe House monies and which had been left over from a previous Dawe House event.

14. At the post-round robin party, complainant was the only individual mixing drinks. Complainant used one blender for mixing alcoholic drinks and one for mixing non-alcoholic drinks. A participant was served a non-alcoholic drink only if she asked for one, and generally the participants did not know if the drink they were handed was alcoholic or non-alcoholic because they had not observed it being prepared. At least one of the House Fellows who was present at the party was under the age of 21, complainant was aware that she was under the age of 21, and this House Fellow was aware that alcoholic beverages were being served and assumed that the drink that she had been handed which had been prepared by complainant was alcoholic. Complainant was 21 years of age or older as of November 26, 1991. At this time, *it was not legal for a person under the age of 21 to consume alcoholic beverages.*

15. There was also a bottle of wine present in complainant's room during this party but the record does not show that this bottle was ever opened or that any of this wine was every consumed during the party.

16. Some time in January of 1992, a Dawe House resident requested a meeting with Ms. Huhn. Ms. Huhn granted this request and 10-15 Dawe House residents attended a meeting with Ms. Huhn on January 27, 1992. The meeting had been requested to discuss with Ms. Huhn various concerns and complaints these residents had relating to complainant's performance as a House Fellow. Several of these residents had also prepared writings expressing their concerns and complaints relating to complainant's performance as a House Fellow. *These concerns and complaints generally related to misuse of Dawe House funds, attending off-campus events with residents without permission, providing alcohol to underage residents, being intoxicated in Waters Hall and while on duty as a House Fellow, and not respecting the confidentiality of information provided to her by residents.* During this meeting, Ms. Huhn first became aware of the party held in complainant's room on November 26, 1991.

17. After this meeting, Ms. Huhn contacted Mr. Helmkamp and relayed to him what had occurred at the meeting. Mr. Helmkamp asked Ms. Huhn to do a preliminary investigation to determine if any of the concerns or complaints or incidents could be corroborated.

18. Once Ms. Huhn's preliminary investigation had been completed, she and Mr. Helmkamp met with complainant on January 29, 1992, at 3:30 p.m., to *advise her of the nature of the concerns and complaints that had been raised*

and to advise her that an investigation of these, including the incident of November 26, 1991, would be conducted.

19. At 7:30 p.m., Ms. Huhn and Mr. Helmkamp met with complainant and the other House Fellows at Waters Hall to advise them that an investigation of the incident of November 26, 1991, would be conducted and they would be expected to cooperate. After this meeting, Ms. Huhn met with each of the House Fellows individually to discuss the November 26 incident.

20. On February 4, 1992, Mr. Helmkamp met with Tammy Buss, the Dawe House treasurer, to discuss the Dawe House fund and account. Ms. Buss indicated that she was not aware that there was a petty cash fund.

21. None of the House Fellows with whom Ms. Huhn or Mr. Helmkamp met during this investigation indicated that wine was present or consumed during the November 26 party.

22. Ms. Huhn and Mr. Helmkamp met with complainant on February 5, 1991. At this meeting, the incident of November 26 was discussed. After this meeting, Mr. Helmkamp prepared a written summary of the meeting based on notes that he had taken and provided a copy to complainant. Mr. Helmkamp asked complainant to review the summary and make any changes she felt were appropriate. Complainant took this summary with her and returned it later to Mr. Helmkamp with her suggested changes indicated in her handwriting.

23. Ms. Huhn and Mr. Helmkamp met with complainant on February 7, 1991, to discuss the concerns and complaints presented to Ms. Huhn by Dawe House residents at the meeting of January 27 and in writing. A detailed summary of the discussion at this meeting was subsequently prepared. When asked about a Dawe House petty cash fund, complainant indicated that only she had knowledge of and possession of this fund and it had been created from check #726. Complainant was then asked about check #707 and why the Dawe House balance sheet and account sheets which she had prepared indicated that this check was written for \$5 but the bank statement indicated that the check was cashed for \$50. Complainant did not explain the discrepancy until it was indicated to her that a copy of the check had been requested from the bank. Complainant then explained that she had written a check for \$50 from the Dawe House account while in Whitewater to give to two residents who had accompanied her there, that this \$50 had not been re-deposited in the Dawe

House bank account, but that she had \$50 in a drawer in her room which she was using as the Dawe House petty cash account.

24. At this meeting, complainant stated that she had returned to Madison from Whitewater at 2:00 a.m. but, at hearing, complainant testified that she returned at 10:00 or 11:00 p.m. Complainant acknowledged that she had not notified Ms. Huhn of her trip to Whitewater either before or after her return to Madison.

25. At this meeting, complainant also acknowledged that she had attended an off-campus event/party with residents without notifying or obtaining permission from Ms. Huhn; that she had accompanied underage residents to this event/party and alcohol was served and these underage residents consumed alcohol; and that she had been under the influence of alcohol while present in Waters Hall.

26. After this meeting of February 7, 1992, Ms. Huhn and Mr. Helmkamp agreed that complainant should be terminated. Mr. Helmkamp then met with Mr. Evans who reviewed the information collected by Ms. Huhn and Mr. Helmkamp and concurred in their recommendation.

27. Mr. Huhn and Mr. Helmkamp met with complainant on February 10, 1992, to notify her that a decision to terminate her had been made and to present her with a letter of termination signed by Mr. Helmkamp which stated as follows, in pertinent part:

Thank you for meeting with Clare Huhn and myself on February 5 and February 7, 1992, to discuss allegations of misconduct on your part. In reviewing your responses, a number of those serious allegations were confirmed by you. Incidents such as your attendance, with underage residents, at an off campus event/party where these residents were served alcohol, providing alcohol to an underage staff member and your responses to the allegations of breaking confidentiality cast reasonable doubt on your past job performance and the likelihood of satisfactory job performance in the future. These actions are significant violations of employment rules and regulations.

In addition, your actions in regard to using House Funds to write a check to Ellen Shumaker is inappropriate. As the House Fellow Manual indicates (8-8) a "House Fellow may not sign for an expenditure which is illegal, . . . , or for monies to be used for private purposes." The personal use of items purchased for your House is also problematic.

* * * * *

Your remuneration package will be pro-rated to the termination date of February 10, 1992. As soon as possible you will be notified of the amount of your tuition and meal tickets you will be responsible for refunding to University Housing. If you wish to appeal this decision you must notify Norm Sunstad, Director of University Housing, within five calendar days of receiving this termination notice. . . .

28. Complainant did file an appeal of this termination decision with Mr. Sunstad. The appeals tribunal, which consisted of two males and one female, recommended to Mr. Sunstad that the termination decision be upheld. At the time they made their recommendation, the members of this tribunal had no reason to be aware of complainant's actions in contacting the media in regard to the Halloween mass murder rumor and no reason to be aware of complainant's personality traits, or the manner in which she accepted supervision, expressed her opinion, or interacted with those in authority other than as the result of her appearance before the tribunal. The appeals tribunal followed standard procedure in processing and deciding complainant's appeal.

29. Two male UW-Mad House Fellows were terminated for alcohol-related incidents.

30. The UW-Mad policy and practice relating to both male and female House Fellows is to prorate tuition if they leave their House Fellow position before the end of the second semester.

31. No one involved in making the subject termination decision had any contact with the UW Law School relating to complainant's law school application.

32. The other Waters Hall House Fellows who had been involved in the November 26, 1991, incident had letters of counseling discussing their role in the incident placed in their personnel file.

33. Complainant was not viewed by Ms. Huhn or Mr. Helmkamp as unusually aggressive, opinionated, or outspoken for a female House Fellow.

34. Both Ms. Huhn and Mr. Helmkamp were involved in the terminations of male House Fellows.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to show that there was a probable cause to believe that she was discriminated against on the basis of her sex as alleged.

3. The complainant has failed to sustain this burden.

Opinion

The issues to which the parties agreed include an issue of sexual harassment and an issue of disparate treatment on the basis of sex in regard to the complainant's termination from her House Fellow position. The parties dispute whether these issues should be decided on the merits or whether the probable cause standard should be applied. Since, as discussed below, the Commission concludes that complainant's case fails to satisfy the lower probable cause standard, it is not necessary to reach the question of which standard should apply.

The Fair Employment Act (FEA), §111.32(13), Stats., defines sexual harassment as:

. . . unwelcome 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.

Complainant alleges no actions and none are apparent from the record which would satisfy this definition.

Complainant also alleges disparate treatment in regard to her termination. The Commission, in cases such as this, including in cases where a probable cause standard is being applied, has applied the analytical model set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases (1981). Pursuant to this model, the initial burden is on the complainant to show a prima facie case of discrimination; if the complainant meets this burden, the employer then has the burden of articulating a legitimate, non-discriminatory reason for its actions which the complainant may, in turn, attempt to show was a pretext for discrimination.

In cases involving terminations, the elements of a prima facie case are that the complainant show that she (1) is a member of a class protected by the

FEA; (2) was qualified for the job and performed the job satisfactorily; and (3) was terminated, despite this satisfactory performance, under circumstances which give rise to an inference of discrimination.

As a female, complainant satisfies the first element. In regard to the second element, complainant has failed to show that she performed the job satisfactorily, i.e., the record shows that complainant, in carrying out the duties and responsibilities of her House Fellow position, violated several applicable requirements, i.e., failure to advise Ms. Huhn of complainant's absence from the Madison area to travel to Whitewater (See Findings of Fact 3, 11, 24); use of the Dawe House fund for non-house purposes (See Findings of Fact 5, 11, 23); accompanying residents, including underage residents, to off-campus events/parties where alcohol was served (See Findings of Fact 6, 9, 25); and serving alcohol to underage House Fellows in her room at Dawe House (See Findings of Fact 4, 13, 14). In addition, complainant has failed to show that the circumstances of her termination give rise to an inference of discrimination, i.e., she has failed to show that she was treated differently or held to a different standard than similarly situated male House Fellows and she was replaced by a female.

If complainant had succeeded in establishing a prima facie case, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its termination of complainant. Respondent has stated as the basis for the termination decision complainant's failure, in regard to the incidents cited in the previous paragraph, to satisfy the requirements applicable to House Fellows. This reason is both legitimate and non-discriminatory on its face.

The burden then shifts to complainant to demonstrate pretext. Complainant argues in this regard that she was unfairly singled out in regard to the investigation of the incident of November 26, 1991. However, the record shows that she alone purchased and served the alcoholic beverages to underage House Fellow. As a result, sufficient justification exists for meting out different consequences. It must be noted, however, that complainant is comparing herself here to other female House Fellows. In this regard, and more importantly, complainant has failed to show that male House Fellows, who failed to meet the requirements of respondent's alcohol policy, were treated differently than complainant.

Complainant argues that the pro-active approach she took to the Halloween incident was perceived by her male superiors to be aggressive and take-charge, i.e., a stereotypically male approach which was inappropriate and unseemly for a female, and her termination was based on this perception. First of all, the record does not show that this incident played any part in complainant's termination. The record does show that respondent's reaction to complainant's role in this incident related to her violation of a policy which applied to all House Fellows, male and female, and, in fact, all Division of Housing employees, male and female, and not to the personality traits she exhibited during the incident. In this regard, complainant failed to show that the policy was not as respondent represented it to be or that it was not applied uniformly to all Division of Housing employees.

Complainant also argues that inconsistent reasons were given for her termination and this inconsistency demonstrates pretext. Although the written decision of the appeal panel is not a model of clarity, it is not the Commission's role here to critique the appeal panel but instead to determine whether the totality of the circumstances related to complainant's termination evidence discrimination as alleged. The record does not show that any of the individuals participating in the original termination decision played any role in determining the appeal panel's procedure or decision. Moreover, the record does not show that the appeal panel's process differed from their usual process or from the process they followed in relation to any other termination review. Finally, although the appeal panel appears to have based its decision on only certain of the incidents upon which the original termination decision was based, there were no new incidents cited or relied upon and the Commission fails to find, as a result, any apparent inconsistency.

Complainant also implies that the termination decision and other decisions and actions leading up to it were made by her male superiors without the concurrence of her female supervisor. The record, which includes the testimony of Ms. Huhn, does not support this.

In propounding her argument here, that similarly situated submissive females were treated differently than she, a non-submissive female, complainant failed to establish a required element for application of her theory, i.e., that she was similarly situated to other female House Fellows in regard to the incidents which formed the basis for her termination. The record does not show that any other female House Fellow procured and served

alcoholic beverages to underage House Fellows in the manner that complainant did during the incident of November 26, 1991, or during any similar incident; used house funds in the manner which complainant did for other than house expenditures; accompanied residents, including underage residents, to off-campus parties where alcohol was served in a situation similar to the one described and acknowledged by complainant; and failed to advise their supervisor of their absence from the Madison area in a situation similar to complainant's trip to Whitewater. The record does show, however, that male House Fellows who had violated the alcohol policy in a manner similar to complainant's violation of such policy were, like complainant, terminated.


Finally, complainant has failed to show that she was treated differently in regard to the proration of her House Fellow compensation as the result of her termination than any other terminated House Fellow, male or female; and has failed to show that any agent of respondent had contact with the University of Wisconsin Law School as a means of retaliating against complainant.

Complainant has failed to demonstrate pretext and has failed to show probable cause to believe that she was sexually harassed or discriminated against on the basis of her sex as alleged.

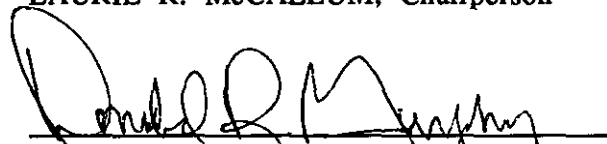
Order

This complaint is dismissed.

Dated: February 20, 1995 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, 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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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. 2/3/95