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MERLIN ERICKSON, \*

Complainant/Appellant, \*

v. \*

Chairperson, WISCONSIN GAMING COMMISSION, \*

Respondent. \*

Case Nos. 92-0207-PC-ER \*  
92-0799-PC \*

\* \* \* \* \*

FINAL  
DECISION  
AND  
ORDER

A Proposed Decision and Order was issued on January 31, 1995. Objections were filed on Mr. Erickson's behalf, to which the Wisconsin Gaming Commission (WGC) responded. The Commission considered the parties' arguments, consulted with the hearing examiner and decided to adopt the proposed decision as the final decision, with the following amendments.

Amendments

- 1. In the Discussion section of the proposed decision, in the final paragraph on p. 26, delete the third sentence for the reasons discussed below in connection with objection #19.
2. In the first full paragraph on page 29 of the proposed decision, change the word "relevant" to "determinative", to clarify the statement of law given.

Objections Discussion

The objections filed by Mr. Erickson are numbered 1 through 24. The discussion below uses the same numbering system. Some numbered objections are omitted from the following discussion because they also were raised in another objection.

1. Objection to statement that a final brief was received by the Commission on November 22, 1994:

Mr. Erickson questioned the meaning of the statement on page 3 of the proposed decision which says the Commission received the final brief on

November 22, 1994. The purpose of the referenced information was to provide an indication of when the case was ready for the examiner to write the decision. Such information is used by the Commission internally as a measure of whether the decision was issued in a reasonably timely manner. The information was not intended as an inventory of all written arguments received.

2. Objection to finding #5, that Ms. Lynch had no reason to disbelieve Ms. Krueger's story:

Mr. Erickson objects to finding #5, on the grounds that Ms. Lynch could have no reason to believe Ms. Krueger without first giving him an opportunity to provide his side of the story. The finding, however, is supported by the record. Ms. Lynch testified (T 391) that she had no reason to disbelieve Ms. Krueger and that she believed her. While it may be true that Ms. Lynch might have obtained a more accurate picture of events by checking with Mr. Erickson, her belief was based upon information provided by Ms. Krueger.

3. Objection to finding #7, that Ms. Lynch first learned of Mr. Erickson's A/C record from Mr. Erickson:

Finding #7 acknowledged that Ms. Lynch knew about the Stefonek TRO from general office gossip and concluded that Ms. Lynch first learned of Mr. Erickson's arrest/conviction record from him. He believes the decision should equate Ms. Lynch's first knowledge of his arrest/conviction record with her knowledge of the Stefonek TRO. He is incorrect. The existence of the Stefonek TRO does not meet the definition of "Arrest record" or "Conviction record", as those terms are defined in s. 111.32(1) and (3), Stats.

4. Objection to finding #8, that Ms. Lynch's dislike of stalking behaviors would exist whether or not Mr. Erickson had an arrest/conviction record and that Ms. Lynch liked Mr. Erickson as a person:

Ms. Lynch's initial testimony on this point was ambiguous, or subject to more than one interpretation. Accordingly, the hearing examiner asked clarifying questions and the responses given by Ms. Lynch support the finding. (See especially, T 511-515.)

5. Objection to finding #10, that Ms. Lynch provided her letter to PO Reece, to Mr. Wilson and/or Joanne Ramhaarter because it was work related:

This finding is supported by the record cites given in the proposed decision. Mr. Erickson attempted to raise at hearing the inference he advances now (T 405-409) by using Ms. Lynch's deposition testimony<sup>1</sup> in direct examination. The inference he attempted to raise was that she reported his behavior because she judged it to be "unseemly". To the examiner, however, the deposition testimony was given in reply to hypothetical questions. In summary, the hypothetical testimony that Ms. Lynch would report certain unseemly behaviors to her supervisors was insufficient to disregard her direct testimony that she gave the information about Mr. Erickson to her supervisors because the most recent incident was work related.

6. Objection to finding #11, that Mr. Erickson looked inside the windows and waited in the parking lot of Ms. Krueger's employment:

Finding #11 was challenged as inappropriately based solely on hearsay testimony. The testimony objected to is in the record (T 393-396), based on questioning from Mr. Erickson's representative. No objections were raised at the time of hearing. If Mr. Erickson is attempting to insert an objection at this point in time (after the record has closed), he is too late.

7. Objection to finding #15, that PO Reece detained Mr. Erickson mainly due to Ms. Krueger's reported sighting of him, to Lynch's observation that he was emotionally unstable and to Mr. Reece's inability to locate him:

Mr. Erickson takes certain testimony in isolation to support this argument. The testimony as a whole, however, does not support his conclusion. For example, on p. 110 of Mr. Reece's deposition, he was asked if the information provided by Ms. Lynch accounted for 25, 15 or 10% of his reason for detaining Mr. Erickson. He answered that it was possible. He was then asked if those reasons could have accounted for 30%, to which he replied that "It could." When then asked if it could account for 40%, he said "I could tell you it could be the whole 100%, but it is not." Such testimony was deemed insufficient to overturn the more specific testimony given by Mr. Reece, at

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<sup>1</sup> This refers to testimony from Ms. Lynch's deposition on April 6, 1994 (she gave a deposition on a second date as well). Neither of her depositions were offered as record evidence.

deposition and hearing transcript pages cited in the proposed decision, as well as the citation mentioned in WGC's written arguments. (Reece Deposition 31-33, 35, 41-42 and Exh. 4).

8. Objection to finding #16, that Ms. Kalish informed PO Reece that she did not want people at work to know she was friendly with Mr. Erickson because she wanted to keep the relationship outside of work:

Mr. Erickson asserts that Ms. Kalish testified she did not want people at work to know about her being friendly with Mr. Erickson because of the way people at work viewed his arrest/conviction record. He offers, however, as support for his argument a citation not to Ms. Kalish's testimony but to deposition testimony of PO Reece. Mr. Erickson has taken the testimony out of context, as shown by the deposition transcript excerpts below.

DT, starting at line 18 on p. 61.

Q Did she [Kalish] tell you why she didn't want Erickson near her in the office?

A: She said because of the past situation Merlin had with Ms. Stefonek. And like I said, it seemed like everybody in the office knew. And she didn't want to be labeled, she didn't want any hassles.

Q Cherri Kalish indicated that she didn't want to be near Merlin Erickson because of what other office people might think?

A: No, I wouldn't say that either. I'm saying that the situation was a high velocity, high-intense situation. She stated that there was no relationship. She said they talked outside of the office and that's where she wanted to keep it.

\* \* \* (Starting again with line 2 on p. 63.)

Q Did Cherri -- was she concerned about being asked questions by other people with regards to her relationship with Erickson?

A: No. Again, like I said, she was clear about what she wanted and what she wanted was to separate whatever they were doing from work and that's what she wanted Merlin to do.

Q Did she indicate how she perceived people at work, what people at work thought of Erickson?

A: No, she didn't. . . . She just didn't want to be involved in the in-house talk. . . .

Q Did she describe what any of that in-house talk was?

A: No.

Q Did she name any people who were part of that in-house talk?

A: No. I really didn't take the questions into that area because I was more concerned about what they were doing, and if she felt threatened, if she was uncomfortable with his actions, if he had done anything unusual.

9. Objection to finding #21, that Kalish confirmed the incidents that she previously talked to Ms. Lynch about with Sergeant Lobitz:

Sergeant Lobitz specifically testified that Kalish confirmed the incidents Ms. Kalish previously talked to Ms. Lynch about, and such testimony was already cited in the proposed decision.

10. Objection to finding #26, that Ms. Kalish was unable to perform her work due to Mr. Erickson prior to September 2, 1992:

Mr. Erickson objected to the statement in finding #26, "that Ms. Kalish was unable to perform her work due to Mr. Erickson prior to September 2, 1992". No such statement exists. Rather, "minor performance problems" were noted and described, as supported in the transcript. (T 651-652 and 660-662).

11. Objection to finding #30, that Ms. Kalish was told by WGC that it was her decision whether to file a complainant against Mr. Erickson:

Mr. Erickson asserts that "[t]here is no evidence in the record that Ms. Kalish was told by WGC that it was her decision as to whether to file a complainant against Mr. Erickson. . . ." He is mistaken. The proposed decision contains the supporting transcript cites which include the following testimony from Ms. Kalish (as an example), as found in T 351-352:

- Q Did Pat Wilson ever tell you you have to file a complaint?  
A: No.  
Q Did she suggest to you that you might want to file a complaint?  
A: Yes.  
Q Did you understand that to be only a suggestion on her part?  
A: Yes.

12. Objection to Finding #60, that field reps did not disclose their deviation from the green bar on their positive time reports:

Ms. Minash testified at hearing (T 693) that the field reps admitted to her that they did not follow the green bar and that they didn't turn in their changes. Such testimony supports the contested finding. Ms. Lynch was not recalled as a witness to describe how her re-check of the time and green bar records was conducted and to explain why the second procedure yielded information about deviations from the green bar which were undiscovered in her first check. Without such further details it is merely speculation for Mr.

Erickson to say that the results of the re-check were inconsistent with the field reps' admission to Ms. Minash.

13. Objection to finding #68, that Ms. Lynch's final draft of Mr. Erickson's performance evaluation was signed by Ms. Minash:

Finding #68 was challenged by Mr. Erickson who asserts that Ms. Lynch's final draft of his evaluation contained the offensive language about which he complained. The examiner was aware this was Mr. Erickson's belief at the time of hearing. Despite many pre-hearing depositions, as well as the opportunity for other types of discovery prior to hearing, the testimony was unclear and the supporting documentation was incomplete regarding how many drafts were prepared by Ms. Lynch and whether the document signed by Ms. Minash was the final draft prepared by Ms. Lynch. Ultimately, the Commission was unpersuaded that Mr. Erickson's belief was correct. Supporting record citations already are included in the proposed decision.

19. Objection to statement in Discussion (p. 26), that Mr. Erickson failed on more than one occasion to provide WGC with information that WGC lacked:

Mr. Erickson failed to inform WGC about more than one contact in which Ms. Kalish had also violated the no-contact agreement. However, the decision statement referred to by Mr. Erickson could be misinterpreted. Accordingly, the decision has been amended to delete the unclear language.

20. Objection to statement in discussion (p. 30), that Ms. Lynch's letter to PO Reece did not affect a term or condition of his employment and, therefore, that no prima facie case was established:

Mr. Erickson objected to this statement because Ms. Lynch sent the information not only to PO Reece, but also to one of her own supervisors. (See finding #10.) Mr. Erickson feels a prima facie case was thereby established because he believes the supervisors' perceptions of him would change in a negative manner. The defined hearing issue, however, addressed only whether discrimination occurred due to Ms. Lynch contacting PO Reece. The hearing issue did not include whether discrimination occurred with copies of the material being sent to one of her supervisors. Even if the hearing issue had included an expanded statement of the issue, no discrimination occurred because Ms. Lynch had a legitimate, non-discriminatory reason for sharing the information with her supervisor; to wit: Mr. Erickson's actions raised the

potential that an abuse of sick leave issue existed, which is a work issue. The record does not support a conclusion that such reason was pretextual.

21. Objection to statement in discussion (p. 31), that Ms. Lynch believed that Mr. Erickson's attentions were unwanted by Ms. Kalish, based on Ms. Kalish's statements to Ms. Lynch:

This statement is supported by the testimony detailed in footnote 3 of the proposed decision.

24. Objection to statement in discussion (p. 33), that Ms. Lynch accepted Ms. Minash's difference in judgment regarding the performance evaluation:

This finding is supported by the record citations in finding #68.

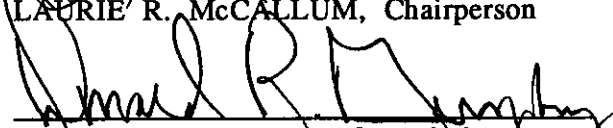
ORDER

The proposed decision is amended and, as amended, is adopted by the full Commission as the final decision in this matter. Accordingly, case number 92-0799-PC and 92-0207-PC-ER are dismissed.

Dated May 15, 1995.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
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



STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

MERLIN ERICKSON,

Complainant/Appellant,

v.

Chairperson, WISCONSIN  
GAMING COMMISSION,

Respondent.

Case Nos. 92-0207-PC-ER  
92-0799-PC

\* \* \* \* \*

PROPOSED  
DECISION  
AND  
ORDER

Mr. Erickson's charge of discrimination (hereafter, Complaint) was filed with the Commission on October 8, 1992, and assigned the case number 92-0207-PC-ER. The complaint alleged that the Wisconsin Gaming Commission (WGC) discriminated against him regarding terms and conditions of employment on the basis of his sex and/or arrest/conviction record. On April 30, 1993, he amended his complaint to add new facts and to add an allegation that discrimination also was due to FEA retaliation and to whistleblower retaliation. He withdrew whistleblowing as a discriminatory basis by letter dated May 10, 1993. On May 18, 1993, he filed a second amendment providing details of allegations described in the first amendment.

An Initial Determination was issued on August 25, 1993, the findings of which are summarized in the table below.

<u>Allegation</u>	<u>Does Probable Cause Exist to Believe Discrimination occurred on the basis of:</u>		
	<u>Sex</u>	<u>A/C Record</u>	<u>FEA Retaliation</u>
1. Melissa Lynch, who supervised Mr. Erickson, (hereafter, referred to as "Mr. E") contacted Mr. E's former girlfriend and provided her with information about his activities.	No	No	No
2. Lynch contacted Mr. E's probation officer (hereafter, P.O.) by phone and in a letter of 6/16/92, implied Mr. E was harassing co-worker, Kalish.	Yes	Yes	No

<u>Allegation</u>	<u>Does Probable Cause Exist to Believe Discrimination occurred on the basis of:</u>		
	<u>Sex</u>	<u>A/C Record</u>	<u>FEA Retaliation</u>
3. On 7/9/92, WGC complained to State Capitol Police (hereafter, CP) that Mr. E might be harassing Kalish.	Yes	Yes	No
4. On 9/3/92, WGC instigated Kalish to file an internal harassment complaint against Mr. E.	Yes	Yes	Yes
5. Pat Wilson (Kalish's supv) called Mr. E's PO and put Kalish on the phone to talk to the PO.	Yes	Yes	Yes
6. On 9/24/92, WGC directed Mr. E to have no contact with Kalish.	No	No	No
7. On 10/5/92, Robert Wilson (WGC's Director of Sales) suspended Mr. E for 5 days for passing notes to Kalish.	No	No	No
8. On 3/25/93, Mr. E was issued a letter of reprimand for work rule violation re: route changes.	No	Yes	Yes
9. On 4/2/93, Mr. E received his 1992-93 performance evaluation which noted he needed to improve in complying with work rules.	No	Yes	Yes

Mr. Erickson did not appeal the findings of No Probable Cause. Accordingly, only the Probable Cause portions of the ID were included as hearing issues in the Conference Report dated November 9, 1993. Of course, the standard of proof was higher for the hearing on the merits than existed during the investigative stage. Specifically, the "preponderance of evidence" test applied at hearing rather than the lower "probable cause" standard applied in the Initial Determination.

Mr. Erickson's second case involves a Civil Service Code (Ch. 230, Stats.), appeal which was filed with the Commission on October 8, 1992, and assigned case number 92-0799-PC (hereafter, the Appeal). The Appeal contests the 5-day suspension noted in allegation #7 in the above chart. The issue for the Appeal was recited in the Conference Report of November 9, 1993, as shown below:

Was there just cause for the five day suspension of the appellant dated 10/5/92? Subissue: Was the degree of discipline imposed excessive?

A discovery dispute existed prior to hearing. The examiner resolved this dispute by letter ruling dated 3/9/94.

A combined hearing was held in the above-noted cases on April 19-21, 1994, after which time the parties agreed to attempt to supplement the hearing record. Mr. Erickson, by letter dated 5/9/94, requested record inclusion of testimony from depositions. WGC filed no objections. By letter dated 5/9/94, WGC proposed record inclusion of testimony from various depositions. Mr. Erickson objected to inclusion of some of the deposition testimony suggested by WGC. The examiner resolved the disputes and granted the uncontested portions of both parties' requests in a ruling dated June 17, 1994, which contains attachments listing the record additions.

Mr. Erickson, by letter dated 6/6/94, proposed record inclusion of documents relating to his arrest and conviction record which the examiner numbered as Exhs. A-31 through A-36. WGC filed objections which the examiner resolved by ruling dated July 1, 1994.

Once the parameters of the record were established, the parties were provided an opportunity to file briefs. WGC filed a motion objecting to portions of the content of Mr. Erickson's initial brief, which the examiner resolved by ruling dated 10/21/94. Motions for extensions of time to file briefs also were received and resolved by the examiner. The final brief was received by the Commission on November 22, 1994. However, the examiner did not receive a copy of the hearing transcript until January 9, 1995.

References to the record are provided in the Findings of Fact as examples of supporting evidence. The citations are not intended to be all-inclusive, nor was an attempt made to include a reference to all supporting evidence.<sup>1</sup>

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<sup>1</sup> The abbreviation "T" is used to refer to the hearing transcript. The abbreviation "DT" is used to refer to portion of deposition transcripts admitted as part of the record.

FINDINGS OF FACT

Background Information:

1. Mr. Erickson has worked for WGC since August 1988, as a Field Retailer Specialist (Field Rep). Basically, he is responsible for delivering lottery tickets to retailers on an assigned route and working with retailers to promote and sell lottery products. His usual work schedule is shown below.

<u>Day</u>	<u>In Office</u>	<u>On Route</u>	<u>Back in Office</u>
Mon.	7:30-9:30	9:30-3	3-4:30
Tues.			
-Fri.	7:30-8:30	8:30-3	3-4:30

- His immediate supervisor was Melissa Lynch, District Manager. (T p. 9-11, 13)
2. In or around February 1992, the WGC security staff resigned. WGC then entered into an agreement with Capitol Police (CP) to provide security services for WGC.
  3. Mr. Erickson dated a co-worker, Cherri Kalish, from April to early September 1992. Their relationship was intimate at times. (T p. 13-14, 248) Ms. Kalish was a Telephone Sales Operator (hereafter, "Tel-Sell Rep"), supervised by Patricia Wilson, Supervisor of the Tel-Sell Unit since March 1990. Ms. Wilson also was a good personal friend of Ms. Kalish. (T p. 245-246)
  4. Prior to dating Ms. Kalish, Mr. Erickson had a dating relationship with Charlene Krueger from October 1986 to July 1989. Mr. Erickson brought Ms. Krueger (a non-WGC employe) to a WGC Christmas party in January 1989, a party also attended by Ms. Lynch (but Ms. Lynch was not Mr. Erickson's supervisor yet). This was the first time Ms. Lynch met Ms. Krueger. A temporary restraining order (TRO) was issued on 8/3/89, as a harassment injunction which prohibited Mr. Erickson from contacting Ms. Krueger (hereafter, Krueger TRO). The injunction remained in force until 8/3/91. (Exh. A-31) (T p. 20-21, 555-559)
  5. Ms. Krueger telephoned Ms. Lynch in June 1991. Ms. Krueger said she wanted Ms. Lynch as Mr. Erickson's supervisor to know that he had been following Ms. Krueger around and asking questions about her. Ms.

- Krueger characterized it as harassment and stalking. Ms. Krueger asked Ms. Lynch to let her know when Mr. Erickson did not appear for work. Ms. Lynch had no reason to disbelieve Ms. Krueger's story. Ms. Lynch did not tell Mr. Erickson or anyone else at WGC about the call. This was the first call Ms. Lynch received from Ms. Krueger. (T p. 390-394, 499)
6. From 1989 until 1991, Mr. Erickson had a relationship with Mary Ann Stefonek, who used to work at WGC. She was not a WGC employe when, on 7/8/91, she obtained a TRO against Mr. Erickson (hereafter, Stefonek TRO). The duration of the TRO was extended twice and, accordingly, did not expire until 7/7/93. (Exh. A-32) On 1/13/92, he was convicted of violating the Stefonek TRO and was placed on probation for 18 months beginning 3/7/92. (Exh. A-33, p. 1-9) (T p. 29)
  7. Mr. Erickson, sometime in or around April 1992, gave the name and phone number of his probation officer (PO), Michael Reece (hereafter, PO Reece), to Ms. Lynch. Mr. Erickson asked Ms. Lynch to call PO Reece saying PO Reece wished to speak with her as his supervisor. This was the first time Ms. Lynch knew Mr. Erickson was on probation because of a TRO violation. This was the first she knew of his arrest/conviction record, although she previously had known about the Stefonek TRO from general office gossip. She called PO Reece about a week later. He introduced himself as Mr. Erickson's PO, informed her of a probation hold on Mr. Erickson, and asked her to contact PO Reece if she saw something odd about Mr. Erickson's behavior. She did not tell PO Reece about the prior call from Ms. Krueger. (See Exh. R-23) (T p. 422, 470-472)
  8. Ms. Lynch liked Mr. Erickson as a person, but did not like his "stalking behaviors". She would feel the same about stalking behaviors if the "stalker" were female and the "victim" male. She would dislike "stalking behaviors" whether the stalker had an arrest/conviction record or not.<sup>2</sup> (T p. 450-452, 511-515)

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<sup>2</sup> The findings in par. 8, are based on credibility issues and on weighing the record evidence. Mr. Erickson believed Ms. Lynch was discriminating against him, but his opinion was based on incorrect information from Ms. Kalish, as noted in the DISCUSSION section of this decision. Also, PO Reece felt Ms. Lynch was neutral in her assessment of Mr. Erickson whenever Ms. Lynch spoke with PO Reece. (DT-Reece p. 46-48, 81-82 & 88-89)

Lynch phone contact with PO. and 6/16/92 letter, implying Mr. Erickson was harassing Ms. Kalish (Sex & A/C Record):

9. Ms. Lynch received a second telephone call from Ms. Krueger on 6/11/92, a day when Mr. Erickson had called in sick to work. Ms. Krueger was upset and said Mr. Erickson was in Stevens Point "stalking" her again; coming to her place of employment, peering in the windows and waiting in the parking lot. Ms. Krueger indicated she was fearful of Mr. Erickson, that a Krueger TRO had existed and that she wanted his harassment to stop. She did not expect Ms. Lynch to do anything about the situation but she wanted Ms. Lynch to be aware of it. Ms. Krueger called knowing Mr. Erickson was on probation. She asked Ms. Lynch for the name and phone number of his probation officer. Ms. Lynch declined the request and suggested she call the probation and parole office to obtain the information. (T p. 394-398)
  10. Ms. Lynch asked Ms. Krueger if she would be willing to document that Mr. Erickson was in Stevens Point as previously stated, and Ms. Krueger agreed to do so. Ms. Krueger sent a letter to PO Reece, dated 6/12/92, which included the information requested by Ms. Lynch. She sent a copy of the same letter to Ms. Lynch (Exh. A-2), along with the following attachments: a police report (Exh. A-3) and a letter she sent the police department dated 7/20/89 (Exh. A-4). Ms. Lynch shared these 3 documents with Mr. Robert Wilson, Sales Director (Ms. Lynch's supervisor) or with Joanne Ramharter (Ms. Wilson's supervisor) because Ms. Lynch felt if Mr. Erickson were stalking when he called in sick to work that the problem involved work and became work-related. Mr. Erickson was not disciplined for calling in sick on 6/11/92. (T p. 398-411)
  11. At hearing, Mr. Erickson denied following Ms. Krueger on 6/11/92. He admitted being in Stevens Point across the street from where she worked, but said this was coincidental to the purpose of his trip which was to sell his baseball card collection. The examiner believed he may have had business in town, but that he also went to where Ms. Krueger worked, looked in the windows and sat in the parking lot.
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12. Mr. Erickson called in sick on June 10 and 11, 1992. On 6/12/92, Mr. Erickson called work and told Ms. Lynch he had seen a doctor on June 11, who gave him a medical excuse for 2 weeks off from work. Ms. Lynch asked him to bring the medical slip to the office, which he did arriving at about 10:15 a.m. During the approximate 30 minutes that he met with Ms. Lynch, Mr. Erickson was shaking and crying. He indicated he had been shaking uncontrollably since June 10th. He further indicated he had not eaten for 3 days.
13. The combination of at least the following 3 things led Ms. Lynch to call PO Reece: a) prior reports from Ms. Kalish that Mr. Erickson had been following Ms. Kalish around<sup>3</sup>; b) Ms. Krueger's phone call on 6/11/92, and c) Mr. Erickson's apparent poor state of mind on 6/12/92.
14. Ms. Lynch spoke with PO Reece by telephone and, at his request, followed by letter dated 6/16/92 (Exh. A-5). Ms. Kalish overheard this conversation and told Mr. Erickson about it. (T p. 332-333) The following are excerpts from the letter:

\* \* \*

I became considerably concerned, as another female at the Wisconsin Lottery [referring to Ms. Kalish], has come to me and reported that Merlin has also been following her around. She works part time for Pizza Pit (sic) and has observed Merlin following her around while she is working and also indicated to me that Merlin came to her home one week-end when she was not there and had asked her son if she was there. This female never gave Merlin her address, nor invited him to her house, nor

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<sup>3</sup> Ms. Kalish, at hearing, denied that she complained to Ms. Lynch about Mr. Erickson prior to and during June 1992. The examiner rejected Ms. Kalish's testimony for several reasons including: 1) Ms. Kalish was a poor hearing witness. She claimed she could not remember some key information and provided contradictory testimony on other matters. 2) Ms. Lynch's version of what Ms. Kalish told Ms. Lynch, was supported by Ms. Wilson's testimony which was based upon information given to her by Ms. Kalish as the events occurred. (eg. T p. 566-577 & 588-595) 3) The examiner could not reconcile Ms. Kalish's testimony which suggested she had no concerns about Mr. Erickson prior to 9/92, with her 7/92 request for Ms. Wilson to withhold information about her medical leave from Mr. Erickson, including the location of her recuperation. 4) Sgt. Lobitz's deposition testimony (cited elsewhere in this decision) was that Ms. Kalish confirmed that the events described by Ms. Lynch occurred. 5) PO Reece's deposition record testimony (cited elsewhere in this decision) includes information that Ms. Kalish admitted to him that she had confided concerns about Mr. Erickson with WGC supervisors.

ever indicated any interest to him. In fact, this female has indicated to Merlin that she is not interested in dating him and to leave her alone. Unfortunately, Merlin appeared in the parking lot one morning at 7:30 am awaiting her arrival, and also called her on Wednesday, June 10 to see if she would go to lunch with him. She indicated to me that she said "No" and hung up as she had already told him to leave her alone.

\* \* \*

I am concerned for the women whom indicate that he has been harassing as Charlene sounded extremely upset when she spoke with me and in observing Merlin's appearance, I was unsure of his emotional stability and what he perhaps would do to himself or others.

I appreciate your request that I inform you of concerns or issues that I observe with this employee. . . .

(Information in brackets was added for clarification.)

15. There was no Krueger TRO in place on 6/11/92. However, PO Reece had Mr. Erickson detained mainly due to Ms. Krueger's reported sighting, to Ms. Lynch's observation that Mr. Erickson appeared emotionally unstable, and to the fact that PO Reece could not locate Mr. Erickson because he had called in sick and did not report his whereabouts to PO Reece. PO Reece had Mr. Erickson incarcerated from June 16-26, 1992, for those behaviors. Mr. Erickson was angry with Ms. Lynch and told her his incarceration was her fault. (T p. 31-33) (DT-Reed, p. 41-42 and Exh. 4)
16. Ms. Kalish overheard the telephone call between Ms. Lynch and PO Reece. They talked about it later. Ms. Lynch told Ms. Kalish about the Krueger TRO. She also told Ms. Kalish that Mr. Erickson had been in Stevens Point where he might have been stalking an ex-girlfriend. Ms. Lynch never told Ms. Kalish to stay away from Mr. Erickson or that he was trouble. She gave Ms. Kalish the name and phone number of Mr. Erickson's PO but did not direct her to call him. Ms. Kalish phoned PO Reece sometime in the latter part of June, and went to see him where she explained she had been seeing Mr. Erickson sometimes off work as a friend and did not want people at work to know. Ms. Kalish said she therefore gave supervisors at work the impression that his attentions were unwarranted or unwelcome. PO Reece pointed out to her that her incorrect statements to supervisors "really jeopardized" Mr. Erickson's



future. Ms. Kalish indicated Mr. Erickson was much too open at work about the relationship which she wished to keep separate from work. She said she no longer wanted much to do with Mr. Erickson, especially at the office, because it was too hectic. She also indicated she did not feel threatened by Mr. Erickson. (T p. 475-6) (DT-Reece, p. 39-42, 61, 63-64, 100) WGC was not informed about this meeting.

17. Ms. Kalish heard about the Stefonek TRO on unspecified dates when she overheard others in the office talking about a TRO issued against Mr. Erickson for an ex-WGC employe who had been engaged to him. Mr. Erickson also told her about it. In fact, on June 27 and 28, 1992, Ms. Kalish helped him defend against charges that he violated the Stefonek TRO. (T p. 225, 337-338)

7/9/92. WGC complaint to State Capitol Police that Mr. Erickson was harassing Kalish (Sex & A/C Record):

18. Ms. Kalish had surgery and went on medical leave from July 6 through August 27, 1992, during which time Mr. Erickson did not see her. (T p. 229-230, 374-375) Ms. Kalish made a specific request to Ms. Wilson that Ms. Wilson not tell Mr. Erickson why she was gone or where she was recuperating. She also asked Ms. Wilson not to divulge the same information to other Field Reps to reduce the chance that Mr. Erickson would learn where she was from other employes. Ms. Kalish stayed with her parents during her recovery. (T p. 586, 645-646)
19. In July 1992, when Ms. Kalish was on medical leave, she received a call from Ms. Wilson who indicated there was an investigation going on about Mr. Erickson. Ms. Wilson set up an appointment for Ms. Kalish to meet with Sgt. Sabine Lobitz on 8/18/92, when Ms. Kalish was scheduled to return to work. Ms. Kalish told Ms. Wilson she did not want work involved because Ms. Kalish did not want to feel responsible for Mr. Erickson getting disciplined, or losing his job. (T p. 606)
20. Sgt. Lobitz was assigned by her CP supervisor to look into the situation as a possible harassment incident occurring at work for which the employer could have liability and could be viewed as having an obligation to investigate. She was informed that one WGC supervisor

- (Ms. Lynch) believed harassment was occurring, but that another supervisor (Ms. Wilson) said it was not occurring. (DT-Lobitz, p. 51-53)
21. Sgt. Lobitz, Ms. Kalish and Ms. Wilson met on 8/18/92, about 8:30 a.m., at a restaurant. (Exh. A-8, p. 3) Ms. Kalish told Sgt. Lobitz that Mr. Erickson's attentions were not annoying or harassing to her. She did not tell Sgt. Lobitz that an intimate, romantic relationship existed (T p. 345) and, in fact, gave her the impression that no relationship existed. (DT-Lobitz, p. 26, 30-33) Ms. Kalish confirmed the occurrence of the incidents she previously talked to Ms. Lynch about, but indicated she could handle the situation herself and if things changed she would contact Sgt. Lobitz. Ms. Kalish also told Sgt. Lobitz that Ms. Lynch had called Ms. Kalish into her office on "numerous occasions" and questioned her about her relationship with Mr. Erickson and had advised Ms. Kalish to be careful given Mr. Erickson's prior history with women. Ms. Kalish told Sgt. Lobitz that the information provided by Ms. Lynch made Ms. Kalish nervous and gave her the impression that Ms. Lynch was out to get Mr. Erickson. Sgt. Lobitz concluded that Mr. Erickson was paying unwanted attention to Ms. Kalish, but that Ms. Kalish was anxious and she felt she could handle the situation herself. (DT-Lobitz p. 28-29, 69, 71-73 & 104)
22. When Mr. Erickson met Ms. Kalish on 8/18/92, she told him Ms. Lynch was trying to get her to file a harassment complaint against him. Ms. Kalish also told Mr. Erickson the CP wanted to speak with her which led to a meeting with Sgt. Lobitz at a restaurant. (T p. 58)
23. On 8/20/92, Mr. Erickson telephoned Sgt. Lobitz "to clarify" that he and Ms. Kalish were in a dating relationship which was friendly. Sgt. Lobitz felt this information conflicted with the information from Ms. Kalish. Sgt. Lobitz no longer knew if a relationship existed between the two or not. (Exh. A-8, p. 3) (DT-Lobitz p. 31-33) (T p. 50-51)
24. On 8/25/92, Mr. Erickson filed an internal WGC discrimination complaint naming Ms. Lynch as an alleged wrongdoer. (Exh. R-18) He showed the form to Ms. Wilson before he filed and made a point of saying he was filing it against Ms. Lynch. He submitted the form to Maureen Hlavacek, Director of Administration & Operations, in the morning before he left to perform his route work. He returned to the

office in the afternoon, at which time he found a note from Ms. Kalish (Exh. A-10) saying the office atmosphere was "hot" and he, therefore, should not talk to her at work. Ms. Lynch was aware the complaint was filed but she was not surprised because she knew Mr. Erickson was upset with her about his incarceration in June. (T p. 15, 23-38, 446-48)

25. Ms. Kalish went to Mr. Erickson's apartment the evening of 8/25/92. They discussed the internal complaint he filed. Ms. Kalish did not want to be involved with the complaint and appeared to Mr. Erickson as being very "uptight" about it. Mr. Erickson decided to withdraw the internal complaint and did so by letter dated 8/31/92 (Exh. R-16). (T p. 15, 24)

WGC instigated Kalish to file internal complaint against Mr. Erickson on 9/3/92 (sex. arrest/conviction & FEA retaliation):

26. When Ms. Kalish returned to work after her medical leave, she had minor performance problems, some stemming from being away from the job and attempting to regain her keying skills. Ms. Wilson also noticed Ms. Kalish was not taking her scheduled break times, which was a concern due to legal requirements regarding work hours and overtime pay. Ms. Wilson asked Ms. Kalish about it. Ms. Kalish replied that she was being followed by Mr. Erickson to work and home, that her contact with Sgt. Lobitz troubled her, that she was not sleeping well and that she was nervous being at work when Mr. Erickson was there. Ms. Kalish said she was stressed out and fearful due to the unwanted contacts. Ms. Kalish complained that Mr. Erickson would stare at her at work. Ms. Kalish requested a change in her work station location so she would not be in Mr. Erickson's direct line of sight when he walked in and out of the building.
27. At the end of the workday on 9/2/92, Ms. Kalish indicated she was frightened by Mr. Erickson and afraid to leave the building because he might be waiting for her in the parking lot. Ms. Wilson walked her out to her car. Mr. Erickson was sitting in his car which was located about 3 rows behind Ms. Kalish's car. It started raining. Ms. Wilson and Ms. Kalish sat in Ms. Kalish's car for about 10-15 minutes, hoping Mr. Erickson would leave but he did not. Ms. Wilson indicated she had to return to the building to finish her work. Ms. Kalish drove her to the

rear entrance where Ms. Wilson stood to watch Ms. Kalish drive from the parking lot. Ms. Wilson saw Mr. Erickson driving his car out of the lot and following Ms. Kalish. (T p. 663-668)

28. Mr. Erickson thought Ms. Kalish had agreed to meet him after work on 9/2/92, but failed to do so. He followed her as she drove out of WGC's parking lot "to see where she was going". She went to Monroe Street and stopped at a store where he spoke with her and reminded her they had planned to meet after work. He asked if she had a boyfriend but she said she no, she was just going to see a friend. They both left but he saw her car again and followed her until he saw her park on a dead end street. He went home and called her at home several times but she did not answer. He drove back to the dead end street at about 10:30 p.m., where he confronted Tom Heinzen, the friend Ms. Kalish had gone to see. (T p. 53-57)
29. Ms. Kalish went to work as usual on 9/3/92, but was frightened and visibly upset. (T p. 350-351) Ms. Wilson asked Ms. Kalish if she was okay, at which time Ms. Kalish told Ms. Wilson about events of the prior evening. Ms. Wilson replied that it was time to get work involved. Ms. Kalish stayed at her desk while Ms. Wilson went to Ms. Ramharter's office (Ms. Wilson's supervisor). Ms. Wilson took this action because she felt the incident started in WGC's parking lot and, therefore, was work related at least in part. (T p. 615-619)
30. Ms. Wilson told Ms. Ramharter what she had observed the prior evening in the parking lot. Ms. Wilson then asked Ms. Kalish to come to Ms. Ramharter's office where Ms. Ramharter and Mr. Wilson were waiting. Ms. Kalish spoke about the prior evening's events which occurred after she left the WGC parking lot. Information was given to Ms. Kalish about WGC's Employee Assistance Program (EAP). Ms. Kalish was shown a form on which an internal harassment complaint could be filed. She was told it was her decision on whether to file a complaint and if she decided to do so, she was told to read the directions before filling out the form. Ms. Kalish had not planned to file a complaint when she arrived at work. She still did not want work involved with her personal dating situation, but failed to voice any reluctance to Ms. Wilson, Mr. Wilson or Ms. Ramharter. Instead, she filled out the complaint form. Ms. Kalish

acknowledged that no one told her to file the complaint and that she understood the filing to be a suggestion, not a supervisory directive. (T p. 352-357 & 622-627)

31. By the time she filed the internal complaint, Ms. Kalish made it clear to WGC that Mr. Erickson's attentions were unwelcome. (T p. 357) She did not tell him that she filed the complaint. He learned of it for the first time during the Commission's investigation of his discrimination complaint. (T p. 42, 59)
32. WGC's internal complaint form asks for details about the alleged discrimination including dates, places, names and titles of person involved. Ms. Kalish's response is shown below.

9/2/92 - Wi. Lottery Parking Lot  
Friend's home - off of Midvale Blvd.

Following in car. Asked to stop doing it. Left. Had to have followed me to friend's house & waited there for 5 hours outside until I left for home. Came by. Saw me leaving. Turn car around quickly. Tried to run down friend in street & took off after me in my car. My friend called my son & called Sauk Police to ask them to watch for me to come into town. He may have been right behind me.

Late yesterday afternoon, (at 4:30) Merlin was observed by both Pat Wilson & myself leaving the building. He quickly turned around at the back door, stood there and stared (with glazed eyes) at me. A very eery look. Because of this, I was hesitant to leave. Pat was willing to walk me out to my car, which she did. Merlin had moved his car from the back of the building to the front & was sitting in his car waiting for me. He made no attempt to leave.

The next morning he was found giving me very staring looks that would kill if they could. (In the office.) I went to copy machine & of course he followed, but ...

(The original copy is incomplete, whether Exh. A-11 or R-31 is used.)

33. Mr. Erickson believes WGC influenced Ms. Kalish to the point where she filed a complaint against him based upon his recollection that she told him at his apartment on 8/19/92 and 9/7/92, that "They" (exact identity unspecified) wanted her to file a complaint.

Part One: 10/5/92: Five day suspension (civil service appeal only):

34. On 9/3/92, Sgt. Lobitz met with Mr. Wilson and Michael A. Liethen at WGC per WGC's request. Mr. Wilson indicated that Ms. Kalish wished to file a complaint against Mr. Erickson, but feared for her safety. Sgt. Lobitz shared the conflicting information she received from Mr. Erickson and Ms. Kalish regarding the existence of a dating relationship. (DT-Lobitz, starting on p. 82) After much discussion, Sgt. Lobitz agreed to attempt to arrange a meeting with Mr. Erickson and Ms. Kalish.
35. On 9/4/92, Ms. Kalish called Sgt. Lobitz and requested a meeting where Sgt. Lobitz could try to help Mr. Erickson and Ms. Kalish work out their problems. (T p. 304) A meeting was held the same day with the following individuals attending: Mr. Erickson, Sgt. Lobitz and Ms. Kalish. At the meeting, Ms. Kalish stated clearly and Mr. Erickson realized for the first time that Ms. Kalish did not welcome his attentions. His reply was to ask Ms. Kalish to leave him alone if that is how she felt. (DT-Lobitz, starting at p. 87) Sgt. Lobitz's notes of the meeting are shown below (from Exh. A-8, p. 4):

On 9/4/92, I received a call from Kalish. At that time Kalish agreed and supported the idea that she, Merlin, and I meet in order to discuss this problem. At approximately 8:15 am we met at the Lottery office on the Beltline Highway, Madison.

It was confirmed in the course of the discussion that Erickson and Kalish had had an intimate relationship outside of the work place which was terminated on the night of September 2, 1992, and resulted in the events described by Kalish to Bob Wilson.

It was agreed upon by both Kalish and Erickson that they would be civil to one another around the work place and that Erickson would not follow or make contact with Kalish outside of the work place.

It was further identified by both Kalish and Erickson that the work place problems were generated more by the unwanted involvement of Lisa Lynch and Pat Wilson than by Kalish or Erickson themselves.

I then again met with Bob Wilson and Liethen. Bob Wilson was going to ask if Kalish wanted to withdraw her complaint at this time. Wilson would also be speaking to Pat Wilson and Lisa

Lynch and explain the guidelines under which Erickson and Kalish would be operating.

I notified Erickson and Kalish I would contact them in several weeks to see how this was working out.

36. Mr. Erickson and Ms. Kalish understood that the agreement reached at the meeting was voluntary. They had no reason to believe that failure to comply would result in disciplinary action by WGC. (T p. 64-65, 307)
37. After the meeting with Sgt. Lobitz on 9/4/92, Mr. Wilson told Ms. Lynch and Ms. Wilson to stay out of the relationship between Ms. Kalish and Mr. Erickson. (See Exh. R-33.)
38. Ms. Kalish withdrew her internal complaint on 9/4/92. (T p. 303)
39. Ms. Kalish contacted Sgt. Lobitz on 9/16 & 21/92, stating she had observed Mr. Erickson following her outside the workplace. Sgt. Lobitz explained the CP lacked jurisdiction for both incidents and advised Ms. Kalish to report the incidents to the local jurisdiction if she believed he was harassing her. Sgt. Lobitz, on 9/22 or 23/92, shared this information with PO Reed, per the usual CP procedure. PO Reed called Mr. Erickson and reminded him that the "no contact" agreement still was in effect and he agreed to abide by it. WGC did not know about these events. (DT-Lobitz, p. 46-49 & 92-97) (DT-Reed, starting at p. 14)
40. Mr. Erickson, at hearing, admitted having two in-person contacts with Ms. Kalish outside of work after the 9/4/92 meeting. The first contact occurred on 9/7/92, which was Labor Day. Ms. Kalish came to his apartment in Waunakee per prior arrangements. (T p. 369) Ms. Kalish wanted to explain her relationship with Mr. Heinzen. She also said "They" pressured her to file a complaint. (T p. 66-69) The second contact occurred on September 19 or 20, 1992 on a weekend. (T p. 369) He telephoned Ms. Kalish and asked to talk on the phone, but she said she had her kids with her. He asked if she wanted to meet him somewhere. She invited him to her apartment. Her oldest son "checked in" on their conversation to make sure everything was okay. She told Mr. Erickson that she and Mr. Heinzen were just friends. (T p. 69-71) WGC did not know about these 2 meetings. (T p. 221-222, 373-374)
41. Mr. Erickson followed Ms. Kalish on 3 occasions after the 9/4/92 meeting. On an unspecified date in September, he returned from

Wisconsin Dells and stopped at her apartment but she was not there. He later found her at a Kwik Trip store and spoke with her. (T p. 72-73) On a second occasion in September (exact date unknown) he followed her from Pizza Hut (where she worked a second job) and observed that she went to see Mr. Heinzen. Mr. Erickson said he followed her "to reinforce his observing her with Tom". (T p. 73) A third occasion occurred on 9/23/92, a day Mr. Erickson called into work sick. Ms. Kalish saw Mr. Erickson parked by WGC when she left for lunch. She stopped at Burger King to buy lunch and then went to a nearby park to eat. She returned to work when she realized Mr. Erickson had followed her to the park. She was upset and frightened so she returned to work. On her way into the building, she saw Ms. Lynch and briefly told her what had occurred. (T p. 334-335). Once inside the building, Ms. Kalish went directly to Ms. Wilson's office and told her about it.

Pat Wilson's call to PO, and placing Kalish on the line (sex, arrest/conviction and FEA retaliation):

42. After Ms. Kalish told Ms. Wilson about seeing Mr. Erickson in the park on 9/23/92, Ms. Wilson suggested that Ms. Kalish use an office which afforded privacy to call Sgt. Lobitz, which Ms. Kalish did. Ms. Kalish also insisted on calling PO Reed, Mr. Erickson's new PO (since 9/9/92) from a private office; a request which Wilson granted. Kalish could not get in contact with the PO, but kept getting up to go to the private office to try. Ms. Kalish's repeated leaving of her workstation to call the PO was disruptive to her work production. Ms. Kalish told Ms. Wilson that Ms. Kalish could not get through to the PO. Ms. Wilson offered to make the call because Ms. Wilson needed Kalish back at work. Kalish agreed. Ms. Wilson kept trying until she finally got through to PO Reed. Ms. Wilson transferred the call to a private office for Ms. Kalish. (DT-Reed, p. 6-7, & 18) (T p. 673-676)

Part Two: 10/5/92: Five day suspension (civil service appeal only):

43. On 9/24/92, Linda Minash, Director of Human Resources<sup>4</sup>, and Mr. Wilson spoke with Mr. Erickson about the continued contacts with Ms.

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<sup>4</sup> Ms. Minash commenced employment with WGC as the Director of Human Resources in September 1992, becoming permanent in 10/92.



Kalish (Exh. R-45). Ms. Minash and Mr. Wilson told Mr. Erickson that contacts between Ms. Kalish and Mr. Erickson at work were prohibited because the situation between Ms. Kalish and Mr. Erickson was potentially disruptive to the workforce. Mr. Erickson was advised that WGC would investigate any future incidents and take action against either he or Ms. Kalish depending on who caused the disruption. The message from Ms. Minash was that Mr. Erickson and Ms. Lynch had to keep their personal problems out of the workplace. His following Ms. Kalish to the park caused a negative impact at work because Ms. Kalish was so upset she could not work. The same information was given to Ms. Kalish by Ms. Minash. Ms. Minash's notes of the conversation with Mr. Erickson are in the record as Exh. R-45. At this point, both Mr. Erickson and Ms. Kalish should have known that contact at work could lead to discipline. (Exh. R-5) (T p. 74-75, 618-619 & 709-711)

44. Ms. Kalish kept track on her work calendar in September, of the dates upon which Mr. Erickson either spoke with her at work or stared at her. Included are dates after the 9/24/92 meeting, as follows: 9/25, 28, 29 & 30.
45. Mr. Erickson, on 9/24 & 29/92 continued contact with Ms. Kalish by giving her notes at work. He resorted to notes because Ms. Kalish was refusing to speak with him. He gave her three notes on 9/29/92 (Exh. R-32). The first was given to Ms. Kalish at 7:35 a.m., and stated:

Please -- We need to talk. You can't be without a heart!

The second note was given to Ms. Kalish at 3:45 p.m., and was a copy of a prayer card. The third note was given to Ms. Kalish at 4:00 p.m., and stated:

Would you please find a time and place to talk. I want to be on friendly terms with you, but we need to talk. Please.

46. Ms. Kalish asked Ms. Wilson if Ms. Kalish could put the notes or a copy of the notes in a locked file. (T p. 629)
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47. Ms. Kalish called PO Reed on 9/30/92, and told her Mr. Erickson had followed her to a friend's house and was passing notes to her at work. Based upon this information, PO Reed arranged for Mr. Erickson's incarceration for 4-5 days (including a weekend), which occurred immediately prior to the suspension noted in the following paragraph. (T p. 81) When he was released from jail, he was told by PO Reed that the no-contact rule remained in effect and that he was to start counselling. (DT-Reed, p. 21-28)
48. Mr. Erickson was suspended for 5 days for his continued contact with Ms. Kalish via note passing at work. Management reasonably felt a 5-day suspension was warranted due to Mr. Erickson's failure to follow the less severe alternative of complying with the no-contact rule and due to the seriousness with which management viewed potential sexual harassment problems. (T p. 712-713) He was notified of the suspension by letter from Mr. Wilson dated 10/5/92 (Exhs. R-38, R-46 & R-47), which stated as follows:

On September 24, 1992 we met to discuss your conduct with regard to a certain female lottery division employe. You were advised that your conduct was reported as being unwelcome and constituted harassment. Harassment in the workplace is prohibited under both state and federal law. You were told, and you agreed, that you would not have any contact with this employe during work hours.

On Tuesday, September 29, 1992 you passed three notes to this employe during the work day. You admitted to me on Friday, October 2, 1992 that you passed these notes. On Wednesday, September 30, 1992 you passed another note to this employe during the work day. On Monday, September 28, 1992, you were seen in the lottery division parking lot at 2:45 p.m. and were attempting to establish eye contact with this employe, who was on break. (Emphasis appears in the original.)

The Gaming Commission does not tolerate this conduct. You are herein suspended from work without pay for five (5) work days commencing today, Monday, October 5, 1992 at 4:30 p.m. You are not to enter the lottery division premises, including the employe's parking lot during your suspension. you will return to work status on Tuesday, October 13, 1992.

**IF YOU VIOLATE THE TERMS OF YOUR SUSPENSION, OR HAVE CONTACT WITH THIS EMPLOYE WHEN YOU RETURN TO WORK STATUS, YOU MAY BE TERMINATED FROM WORK.**

More Background Information

49. Ms. Kalish called PO Reed on 10/21/92, providing specifics about seeing him following her outside of work on 10/15/92, and his staring at her at work on an unspecified date. PO Reed felt Ms. Kalish's concerns about Mr. Erickson following her on 10/15/92, were valid; but that her concerns about him staring at her suggested paranoia. PO Reed inquired whether Ms. Kalish might need counseling or support, but Ms. Kalish indicated she had a lot of support at work. On 10/21/92, Mr. Heinzen called PO Reed and was irate because Ms. Kalish told him PO Reed had told Ms. Kalish she was crazy and needed counselling. PO Reed felt this was an indication that Ms. Kalish's credibility suffered; to wit: that she lied by omission on occasion. On 10/23/92, PO Reed contacted Mr. Wilson and Ms. Minash to let WGC know that Mr. Heinzen might contact WGC because he had been calling PO Reed and Mr. Erickson. (DT-Reed, p. 31-34 & 63)
50. On 11/16/92, PO Reed received a telephone call from the Waunakee police department saying they issued Mr. Heinzen a citation for harassing phone calls to Mr. Erickson. Mr. Heinzen defended his actions saying Ms. Kalish indicated Mr. Erickson had been following her from Pizza Hut again on 11/16/92. However, Mr. Erickson was performing community work at a hospital and had witnesses to indicate he could not have been following Ms. Kalish on 11/16/92. This incident led PO Reed to believe she should attempt to verify any further allegations brought by Ms. Kalish. Ms. Kalish, however, made no further contact with PO Reed. (DT-Reed, p. 62-67)
51. Mr. Erickson filed his discrimination complaint with the Personnel Commission on 10/8/92. The record does not establish that Ms. Lynch knew he filed this complaint.

3/25/93 letter of reprimand (arrest/conviction record & FEA retaliation):

52. On 1/3/93, Ms. Lynch indicated she had a problem with the time reports submitted by Mr. Erickson. By memo dated 1/5/93 (Exh. A-17), she informed her supervisor, Mr. Wilson, that Mr. Erickson made the corrections on 1/4/93. She asked in the memo if Mr. Erickson would be reprimanded for insubordination for his initial refusal to follow her directive. Mr. Erickson was never reprimanded for this incident. (T p. 82-84)
53. Prior to November 1992, Field Reps did not always adhere to a schedule for delivery of lottery tickets on their routes. A reorganization occurred in or about November 1992, whereby route stops were to be made in a specific sequence as noted on a computerized print out called a "green bar". Field Reps could require deviation from the green bar delivery order by proposing the change on a specific form and by obtaining approving for the change from a WGC committee. WGC had legitimate reasons for requiring delivery in the green bar order. (T p. 484-492)
54. Ms. Lynch became aware that Mr. Erickson was not following the delivery order on his green bar. In early January 1993, Ms. Lynch and Mr. Wilson met with Mr. Erickson and directed him to propose recommended changes to the green bar for his route by January 31, 1993. They were aware he was not following the order of stops as listed on the current green bar and wanted to give him an opportunity to propose changes. (T p. 492)
55. Ms. Lynch spoke with Mr. Erickson on the afternoon of January 31, 1993, because she had not yet received his proposed changes whereas all other Field Reps' proposals had been received. Mr. Erickson indicated he was not going to submit any changes because he was not experiencing any problems from his viewpoint. He also indicated he would not submit anything if a committee had to determine whether to accept/reject his recommended changes. (Exh. R-41) (T p. 496-497)
56. A meeting was held on 2/5/93, with Mr. Wilson, Ms. Minash, Ms. Lynch and Mr. Erickson. Mr. Erickson was informed that until his route changes were submitted and approved by the committee, that he must

deliver tickets in the order listed on the green bar. An extension to 2/19/93, was given for Mr. Erickson to submit proposed route changes; a deadline which he met.

57. On 2/5/93, Mr. Erickson submitted his time report to Ms. Lynch. The report indicated that he continued to make stops in a order different from the green bar list, contrary to the directive given at the 2/5/93 meeting.
58. Mr. Erickson received notice of a written reprimand for insubordination by letter dated 3/25/93 (Exh. A-19). The incidents mentioned in the letter included the following: a) failure to submit route changes by 1/31/93, b) failure to deliver in green bar order after the 2/5/93 meeting, and c) comment which Mr. Erickson made to Ms. Lynch after she informed him that some of his recommended changes were approved. Specifically, he told her: "It does not matter because I am just going to run my route my way anyway." The letter contained a warning that further work rule violations could result in additional disciplinary action, including termination.
59. Ms. Minash asked Mr. Wilson before the letter of reprimand was issued to check all Field Reps' compliance with the green bar order of delivery. Mr. Wilson and Ms. Lynch checked and told Ms. Minash that all the Field Reps complied except for Mr. Erickson. (T p. 688-689 and 494-495)
60. A meeting was held with Ms. Minash and the Field Reps supervised by Ms. Lynch, at which time the Field Reps informed her they all varied from the green bar stop order but did not disclose the deviations on their time reports. Ms. Minash indicated she had not received correct information prior to the meeting. (T p. 690-693)
61. Ms. Minash informed upper management and Ms. Lynch that all Field Reps supervised by Ms. Lynch said they did not follow the green bar order of stops in their assigned region. Ms. Lynch was unaware that no one followed the green bar. Ms. Minash directed Ms. Lynch to go back and re-check her records. Ms. Lynch reported back that Mr. Erickson's deviations were "overnight" (stopped on day other than the day listed on the green bar), whereas the other Field Reps' deviations were within the same day (stopped on appropriate day, but at unauthorized time). Ms. Minash decided Mr. Erickson's reprimand should be withdrawn due

to the admission from other Field Reps that they also failed to follow the green bar. Ms. Minash recommended re-training for the Field Reps. (T p. 690-693)

62. Mr. Erickson's written reprimand of 3/25/93, was removed from his personnel file by Ms. Minash. She notified Mr. Erickson of this action by memo dated 6/11/93 (Exh. A-20). (T p. 93-94)

4/2/93 performance evaluation (arrest/conviction record and FEA retaliation):

63. Ms. Minash further stated in her memo of 6/11/93, that all reference to the 3/25/93 (revoked) reprimand and the underlying incident would be removed from his performance evaluation for the review period of 7/1/92-2/28/93, which he had received previously, spoke to Ms. Minash about and did not sign. (T p. 693-696) Ms. Minash and Mr. Erickson were in agreement at this initial meeting over how the evaluation would be changed to address Mr. Erickson's concerns. (T 722)
64. As initially written, the objectionable material in the performance evaluation included a specific reference to his failure to follow the delivery order as listed in the green bar. (The copy of the initial evaluation is not in the record.) Ms. Lynch signed the evaluation on 4/29/93, but Mr. Erickson did not sign it.
65. On an unspecified date after 6/11/93 (after Ms. Minash revoked the reprimand), Ms. Minash met with Ms. Lynch and explained that references in the evaluation to the green bar had to be removed because the reprimand had been revoked. Ms. Minash further explained that general comments in evaluations, such as "learn to follow rules", need to be supported by citing specific incidents. Ms. Minash said if Ms. Lynch felt Mr. Erickson needed to improve, Ms. Lynch should go back to check her files and then rewrite the evaluation. (T 695-696, 700, 717 & 722-727)
66. Ms. Lynch drafted a second version (Exh. R-35) on a dated which is not specified in the record. In this second version, Ms. Lynch deleted the specific reference to Mr. Erickson's failure to follow the green bar order. On the final page, she left in the general comment that Mr. Erickson needed to follow rules. She provided details to support the general comment on page 4, as shown below:

A1-A2. In January, '93, Merlin did not complete assignment by deadline date as directed by this supervisor in submitting delivery day changes/stop #s. Retailers reported to tel-sel that their delivery day was inaccurate which conflicted with information provided to them by tel-sel. Merlin was informed that he would not deviate from schedule until the committee approved such changes. Merlin did comply and submitted changes at a later date after being directed a second time.

67. Mr. Erickson was dissatisfied with the second version. He discussed his concerns with Ms. Minash on an unspecified date and Ms. Minash agreed that problems remained. Ms. Minash met with Ms. Lynch a second time on an unspecified date. Ms. Lynch explained to Ms. Minash that the specific underlying incidents she was relying on for the rewritten evaluation included Mr. Erickson's problems with his positive time reports discovered in January 1993, and his failure to follow the directive given to him in February 1993, to follow the green bar delivery order. Ms. Lynch at this point in time recognized that other Field Reps also did not follow the delivery order in green bars, but felt Mr. Erickson's situation was different because he was the only one who was personally directed to follow the green bar order (at the meeting in February). Ms. Lynch viewed these as serious violations which showed a negative pattern of behavior worth mentioning in Mr. Erickson's evaluation. Ms. Minash, however, felt the examples were insufficient to show a pattern of problems worth mentioning in an employee evaluation. Ms. Minash asked Ms. Lynch to delete the offending language from the evaluation in a new draft. (T p. 697-698 & 700)
68. On an unspecified date, Ms. Lynch drafted a third version and sent it to Ms. Minash to review. Ms. Minash did not review it until after 11/93, when Ms. Lynch's employment ended at WGC. The offending language did not exist in the version signed by Ms. Minash and Mr. Erickson on 2/11/94 (Exh. R-34). (T 722-724) The record was unclear whether the third version drafted by Ms. Lynch is the version signed by Ms. Minash, or whether Ms. Lynch attempted additional drafts. (T 722) Evaluations are not final until Ms. Minash approves them. She only approved the version marked as Exh. R-34. (T p. 698-700 & 722-724)

69. Mr. Erickson had no reprimands or unsatisfactory evaluations in 1988-1991. The same is true for the period commencing when Ms. Lynch left WGC employment in November 1993.



## CONCLUSIONS OF LAW

### The Appeal (Case #92-0799-PC)

1. WGC has the burden to show by a preponderance of the evidence whether just cause existed to impose discipline and whether the discipline imposed was not excessive.
2. WGC met its burden.
3. Just cause existed for imposition of discipline and the 5-day suspension was not excessive.

### The Complaint (Case #92-0207-PC-ER)

4. Mr. Erickson is protected under the FEA by virtue of his sex and his arrest/conviction record.
5. Mr. Erickson is protected under the FEA against retaliation for filing a sexual harassment complaint with WGC on 8/25/92, and for filing a charge of discrimination with the Personnel Commission on 10/8/92.
6. Mr. Erickson has the burden to show by a preponderance of the evidence that discrimination and/or FEA retaliation occurred as alleged.
7. Mr. Erickson failed to meet his burden on all allegations.
8. WGC did not discriminate against Mr. Erickson on the basis of his sex or his arrest/conviction record.
9. WGC did not retaliate against Mr. Erickson for his protected FEA activity.

## DISCUSSION

### Basic Credibility Issues

The credible evidence in the record and observation of witnesses at hearing led the examiner to believe that Ms. Kalish and Mr. Erickson had a dating relationship which was not out of the ordinary initially. However, by May and June 1992, events had occurred in the relationship which led Ms. Kalish to be sufficiently fearful to share her concerns with Ms. Lynch. These concerns also led her to ask Ms. Wilson in July 1992, not to let Mr. Erickson know where she would be hospitalized or recuperating from surgery and to withhold the same information from other Field Reps to reduce the chance that Mr. Erickson would hear the information from others.

Ms. Kalish did not discuss her concerns about their relationship with Mr. Erickson. To the contrary, she led him to believe nothing was wrong and that Ms. Lynch and Ms. Wilson were interfering without good reason. She also led Mr. Erickson to believe Ms. Lynch was "out to get him".

Ms. Kalish initially did not want work involved because she did believe she could "handle the situation" and because she did not want to be responsible for any negative impact on Mr. Erickson's employment at WGC. However, Mr. Erickson's following her on 9/2/92, frightened her with the result that she did file an internal complaint. Ms. Kalish felt more secure after Sgt. Lobitz's mediation efforts led to the informal agreement on 9/4/92. In fact, Ms. Kalish violated the agreement herself by meeting with Mr. Erickson on two subsequent occasions. Mr. Erickson's sudden appearance at the park during Ms. Kalish's lunch on 9/23/92, re-fueled her fears and desire for WGC involvement.

Many aspects of this case are unfortunate. It is unfortunate Ms. Kalish was not more forthright with Mr. Erickson regarding their relationship because her untruthfulness, which could have been well-intended to save him pain or embarrassment, only led to him to incorrectly believe that the dating relationship was welcome and that WGC harbored unwarranted animus towards him.

It also is unfortunate that Mr. Erickson felt a need or desire to follow Ms. Kalish around. He should have known by 9/4/92, that his attentions were unwanted by Ms. Kalish. He should have known by 9/4/92, that she likely would become fearful of him if she saw him follow her around.

It also is unfortunate that these individuals were not always truthful providing information to WGC about their relationship. WGC's actions only can be reviewed based upon the information it knew or learned of during its investigation and reasonably believed. It was unconvincing for Mr. Erickson to argue that WGC's actions should have been different when he possessed information at times which he knew WGC lacked, yet he failed to enlighten WGC. For example, he failed to inform WGC that Ms. Kalish also violated the no-contact agreement of 9/4/92, by meeting with him outside the workplace. It is unfair for him then to complain that WGC took certain actions based on its belief that only he deviated from the agreement to Ms. Kalish's distress.

Appeal of the 5-day suspension (Case #92-0799-PC)

**Standard of Analysis:** In disciplinary appeals, the Commission is required to apply a two-step analysis:

First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. Holt v. DOT, 79-86-PC, 11/8/79.

The Wisconsin Supreme Court has defined "just cause" in the context of employe discipline as follows:

[O]ne appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974).

The severity of the discipline imposed is reviewed by considering, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior work record with the respondent. Barden v. UW-System, 82-237-PC (6/9/83) In cases where it is possible to compare discipline meted out in somewhat similar cases, this also is an appropriate factor to consider. Mitchell v. DNR, 83-0228-PC (8/30/84), citing Baxter v. DHSS, 82-85-PC (8/31/83).

**Analysis for Mr. Erickson's case<sup>5</sup>:** Just cause existed for imposition of discipline. Ms. Kalish told Mr. Erickson on 9/4/92, that his attentions were unwelcome. After further incident, Ms. Minash and Mr. Wilson met with Mr. Erickson on 9/24/92, told him contacts with Ms. Kalish at work were prohibited, and warned that failure to comply could result in

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<sup>5</sup> WGC mentioned in its brief that Mr. Erickson's conduct violated a WGC work rule. Mr. Erickson objected on the basis that the record contains no evidence of such work rule. Mr. Erickson is correct. Accordingly, this information from WGC was disregarded.

discipline. Despite clear notice of WGC's expectations and the consequences of failing to follow the directive, further incidents occurred as described in the disciplinary letter dated 10/5/92. In summary, just cause existed based on Mr. Erickson's continued contact after his meeting with Ms. Minash and Mr. Wilson on 9/24/92.

The note-passing by Mr. Erickson most likely did not involve sufficient time to conclude that his work performance was impaired. Similarly, his presence in the parking lot on 9/28/92, appears to have been during his break time and, accordingly, cannot be said to have impaired his work performance. He may have been mentally preoccupied at work by his feelings about the end of his friendship with Ms. Kalish, but WGC did not show that his work performance suffered.

The potential impact on the efficiency of the group with which Mr. Erickson worked, however, results in the conclusion that just cause existed for imposing discipline. Ms. Kalish's performance suffered due to his unwelcome attentions. Further, his conduct necessitated the taking of WGC managers from their other tasks to attempt to correct his behaviors.

The discipline imposed was not excessive. Sexual harassment in the workplace is a serious matter. The impact on WGC was not de minimus. The impact was real with potential for becoming worse if WGC did not take steps to stop Mr. Erickson's behavior toward Ms. Kalish.

WGC could have recognized Mr. Erickson's prior good work record and could have issued merely another warning rather than a 5 day suspension. However, he already received a clear warning on 9/24/92, which did not change his behavior. There is no reason to believe a second warning (whether oral or written) would have been effective.

Mr. Erickson argued (p. 8-9 of Erickson brief dated 10/31/94), that WGC had no potential liability under 29 CFR 1604.11(a) & (d), the text of which is shown below.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the

purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

\* \* \*

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

The Commission first notes that Mr. Erickson's emphasis on whether an actual violation of the CFR occurred is misplaced in the context of his appeal. It is not relevant whether a violation of state or federal discrimination laws actually existed. Asche v. DER, 90-0159-PC (3/10/93), reversed on other grounds, Asche v. PC, 93-CV-1365 (Dane County 12/8/93), appeal pending Asche v. Wis. Pers. Comm., 94-0450 (Ct. App., Dist. IV). The correct inquiry is whether respondent's actions were reasonable under the circumstances. The Commission believes they were.

It would be reasonable for WGC to believe that Mr. Erickson's conduct after the meeting with Ms. Minash and Mr. Wilson on 9/24/94, had the effect of creating an intimidating, hostile or offensive work environment for Ms. Kalish to such extent that she was afraid of his actions (ie. waiting for her in the parking lot) and potential actions (following her from work). As far as WGC knew, Ms. Kalish no longer welcomed his attentions, his attentions were based on her sex, and Ms. Kalish felt his conduct created an intimidating or offensive work environment. Under these circumstances, it was reasonable for WGC to believe it had a duty to intervene to attempt to correct the offensive work atmosphere.

Mr. Erickson argued that imposition of the no-contact-at-work rule was unreasonable because the record indicated that "by the middle of October . . . something was wrong with Kalish . . . [who] seemed to be upset even if she just saw the Complainant". (See Erickson brief dated 10/31/94, starting on p. 13.) This information may be true but does not support his argument because the "middle of October" post-dates the action he complains of; to wit: imposition of the no-contact rule, the suspension and his actions which formed a basis for the suspension. Furthermore, the events of 9/23/92 which led to imposition

of the no-contact rule, began at work and were of a "stalking" nature. It was not unreasonable for her to react by being upset and frightened.

Discrimination Complaint (Case #92-0207-PC-ER)

**Standard of Analysis:** Under the Wisconsin FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the context of discrimination regarding terms and conditions of employment, a prima facie case is demonstrated if the evidence shows: 1) the complainant is a member of a protected group; 2) the complainant 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. In context of discrimination regarding FEA retaliation, a prima facie case also requires the record to show that the alleged retaliator(s) was aware of complainant's protected activities.

**Analysis of complaints raised  
in Mr. Erickson's Discrimination Case.**

Lynch contacting PO Reece by phone and letter dated 6/16/92:

Mr. Erickson failed to show a prima facie case of discrimination on the basis of sex or arrest/conviction record in regard to this allegation because Ms. Lynch's actions of contacting PO Reece on these particular occasions did not affect a term or condition of Mr. Erickson's employment.

WGC complaint on 7/9/92 to CP that Mr. Erickson might be harassing Ms. Kalish.

Mr. Erickson established a prima facie case of discrimination in regard to this allegation. He was eligible to file on the bases of his sex and arrest/conviction record. The CP was performing security functions for WGC. Accordingly, the investigation by CP for all intents and purposes was an

internal investigation by WGC of Mr. Erickson as a WGC employe which constitutes a term and condition of employment. The requisite inference of discrimination could be viewed as present because Mr. Erickson believed in July 1992, that his contact with Ms. Kalish was with her consent and without her complaint.

WGC offered a legitimate, non-discriminatory reason for initiating an investigation. Specifically, Ms. Kalish had informed Ms. Lynch that Mr. Erickson's attentions were unwelcome which triggered WGC's duty to determine if the allegations were true and whether an impact existed at the workplace.

Mr. Erickson's evidence of pretext are Ms. Kalish's repeated statements to him that she did not advise Ms. Lynch that his attentions were unwelcome. The credible evidence in the record, however, leads to the conclusions that Ms. Kalish did complain to Ms. Lynch and that Ms. Lynch's concern was based upon Ms. Kalish's reported unwelcome attentions.

Mr. Erickson also attempted to show pretext by stating his perception that WGC's response would have been different if the alleged "stalker" had been female and the alleged victim male. Ms. Lynch testified that her actions would have been the same if the sex of the "stalker" and "victim" had been reversed. While Mr. Erickson characterizes Ms. Lynch's testimony as self serving in his post hearing brief, he did not provide any record evidence beyond his own speculation to support his claim that Ms. Lynch would have acted differently if the sex roles had been reversed. The record lacks any evidence that Ms. Lynch treated similarly-situated employes differently based upon their sex. In conclusion, Mr. Erickson failed to show that his sex or arrest/conviction record played a part in WGC's decision to refer the matter to WGC for investigation.

The internal complaint filed on 9/3/92, by Ms. Kalish against Mr. Erickson

Mr. Erickson established some elements of a prima facie case of sex and arrest/conviction record in regard to this allegation. As previously noted, he is protected under the FEA on the basis of sex and arrest/conviction record. He is further protected under the FEA against retaliation for filing his internal complaint against Ms. Lynch on 8/25/92. The requisite inference of discrimination could be viewed as present because as of 9/3/92, Mr. Erickson

believed his contact with Ms. Kalish was welcome. In regard to a prima facie case of retaliation, the record indicates Ms. Wilson was aware that Mr. Erickson filed an internal complaint.

As a final element of his prima facie case, Mr. Erickson alleged that WGC instigated Ms. Kalish's filing of an internal complaint against him. The allegation, if true, affected a term and condition of his employment because filing the complaint had the potential to trigger an internal investigation and to impact negatively on Mr. Erickson's work record.

The hearing record supports WGC's assertion that the alleged adverse action did not occur. WGC provided Ms. Kalish with an opportunity to file an internal complaint. WGC did not instigate or coerce Ms. Kalish. Accordingly, Mr. Erickson did not establish discrimination or retaliation in regard to this allegation.

Allegation that Ms. Wilson called PO Reed and placed Ms. Kalish on the line

A prima facie case of sex, arrest/conviction record and retaliation were not established because the circumstances do not give rise to an inference of discrimination. The allegation was not substantiated even if the Commission felt that a prima facie case had been established.

The credible evidence in the record showed that Ms. Wilson was making the call at Ms. Kalish's request. (See par. 44 of the Findings of Fact.) The record lacked credible evidence to suggest that Ms. Wilson's compliance with the request was based on Mr. Erickson's sex or arrest/conviction record, or was taken in retaliation for his protected FEA activities.

3/25/93 letter of reprimand re: route changes and 1992-93 performance evaluation

A prima facie case of FEA retaliation and discrimination on the basis of arrest/conviction record was established for the two allegations noted above. Ms. Lynch was aware Mr. Erickson filed an internal complaint against her. The reprimand was based upon information she provided and she wrote the performance evaluations. The circumstances giving rise to an inference of retaliation and discrimination include the fact that all Field Reps under Ms. Lynch's supervision violated the same rule (perhaps to a lesser degree) yet were not reprimanded. WGC later rescinded the reprimand and the



performance evaluation was not formally corrected for eight months after the reprimand was rescinded.

The record shows Ms. Lynch reasonably believed until sometime after the reprimand was issued that Mr. Erickson was the only Field Rep under her supervision who failed to follow deliveries in green bar order. Some time after the reprimand was issued, however, Ms. Minash informed her that other Field Reps admitted to not following their green bar delivery order without first obtaining approval from herself or the committee. However, the other Field Reps told Ms. Minash that they did not reflect their route deviations on time reports. Ms. Lynch could not have prior knowledge about unreported deviations. Accordingly, the record is insufficient to show that discrimination occurred in relation to the written reprimand.

Ms. Minash revoked the reprimand by letter dated 6/11/93, and stated in the letter that the underlying incident would be removed from Mr. Erickson's evaluation. The fact remains that this was not accomplished until 2/11/94. The record does not demonstrate, however, that such delay was due to Mr. Erickson's arrest/conviction record or to retaliation.

Two WGC staff were involved with the delay in correcting Mr. Erickson's evaluation, Ms. Lynch and Ms. Minash. Mr. Erickson and Ms. Minash at their initial meeting reached agreement as to how the evaluation should change. Accordingly, the evidence is insufficient to show that Ms. Minash's involvement was contrary to his interests, or was based upon his arrest/conviction record or upon FEA retaliation.

Ms. Lynch's efforts to correct the evaluation ended in 11/93, when she left WGC employment. Up until she left, she made a good-faith effort to comply with Ms. Minash's instructions. The second version showed an attempt to follow Ms. Minash's suggestion to cite specific incidents other than the underlying facts of the revoked discipline. Mr. Erickson's behaviors were different than those of the other Field Reps in his initial refusal to comply with the new system of committee approval for route changes and in his failure to follow the directive given to him in February 1993. The Commission feels it was reasonable for Ms. Lynch to feel that these distinctions warranted comment in Mr. Erickson's evaluation. Ms. Minash disagreed. Ms. Lynch accepted this difference in judgement and submitted at least one more draft. It was beyond Ms. Lynch's control that the draft remained on Ms. Minash's desk

for about 4 months after Ms. Lynch's employment ended at WGC. The record does not establish that any delay caused by Ms. Lynch was due to Mr. Erickson's arrest/conviction record or to FEA retaliation.

ORDER

That the suspension which is the subject of case #92-0799-PC is affirmed, that case #92-0799-PC be dismissed, and that case #92-0207-PC-ER be dismissed.

Dated \_\_\_\_\_, 1995.

STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

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