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BARBARA NOWACZYK-PIORO,
 Complainant,

v.

President, UNIVERSITY OF
 WISCONSIN SYSTEM (Platteville),
 Respondent.

Case No. 93-0118-PC-ER

* * * * *

FINAL
ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered the parties' written objections and oral arguments with respect thereto, and has consulted with the hearing examiner. The Commission adopts the proposed decision and order, a copy of which is attached and incorporated by reference, as its final disposition of this matter, with the following comments.

Complainant has made a number of contentions concerning the manner in which the hearing was conducted. She particularly objects to the examiner's decision to hold the hearing on the UW-Platteville campus.

The record reflects that as a result of a prehearing conference held on January 10, 1994, the hearing was scheduled to be conducted at the Grant County Law Enforcement Center in Lancaster. On April 20, 1994, respondent filed a motion to change the hearing site to UW-Platteville. Respondent cited the following in support of the motion:

Virtually all of my witnesses, as well as those whom complainant has listed, are UW-Platteville administrators and faculty members. It will be a significant burden for these people to have to appear in Lancaster for the hearing, given the number of witnesses, the travel involved, and the fact that the hearing is scheduled during a particularly busy time, when the academic year is drawing to a close. These matters are especially problematic for those who are listed as witnesses for the complainant as well as the respondent. I am, therefore, hereby requesting that arrangements be made to conduct this hearing in Platteville.

I do not believe this should create a problem for the complainant. The reasons initially given for conducting the hearing in Lancaster

had to do with complainant's concern that witnesses might feel "intimidated" if they had to testify in Platteville, and her own unwillingness to have a public hearing in this case in Platteville. Through the discovery process, and specifically during depositions of many of the potential witnesses, it has become clear that the witnesses do not feel intimidated in relation to their testimony. Indeed, their depositions have been conducted successfully in the city of Platteville and at UW-Platteville itself. As to complainant's personal concerns, I would be agreeable to making any reasonable arrangements that would restrict access to the hearing, including sequestration of witnesses.

Complainant's objections to holding the hearing at UW-Platteville are that it is inherently a non-neutral site, and the witnesses were subject to intimidation because of having to testify in front of members of UW-Platteville management. With respect to the latter concern, the rules on sequestration would not be any different if the hearing had been held in Lancaster, so this factor has no relationship to the location of the hearing. As to the "neutral site" issue, while this is a legitimate factor to be considered, so are the ones raised by respondent. Under the circumstances, the examiner's decision on the hearing venue did not constitute an abuse of discretion.

Complainant contends in her objections to the proposed decision the examiner erred with respect to certain evidentiary rulings involving hearsay:

Ms. Pioro attempted to testify about comments that students had made to her about what Professor Balachandran had said to them about her; these responses were successfully objected to on the grounds of hearsay, notwithstanding that Respondents asked many questions of Respondent's witnesses about what students had said about Pioro, and the answers were permitted over objection. p. 5, n. 4.

As an administrative agency, the Commission is "not bound by common law or statutory rules of evidence," §227.45(1), Stats., and the admission of hearsay evidence is discretionary with the examiner, §PC 5.03(5), Wis. Adm. Code. The students' statements concerning Pioro's teaching presumably went to respondent's state of mind or the information it had before it when it reached its decision. The comments by students to complainant about what Professor Balachandran had said to them about complainant presumably went to the truth of the matters asserted. The examiner did not abuse his discretion in making these rulings.

Complainant contends that the examiner glossed over the issue of the alleged intimidation of complainant's witnesses by respondent. The proposed decision states at page 17:

Ms. Pioro also argues that respondent retaliated against her by tampering or interfering with her witnesses. Complainant provided no legal basis for this interpretation of the WFEA. Regardless, the witness' claim of threats was disputed by the alleged perpetrator and was insufficient to overcome the offered explanation.

The proposed decision apparently alludes to a question as to whether a claim of witness intimidation would be cognizable under the FEA. This of course is a moot point, because while complainant refers to this subject in her posthearing briefs, she has never amended her complaint or otherwise raised it as a claim per se. However, because it could affect the witnesses' testimony and otherwise compromise the integrity of the hearing process, allegations of witness intimidation can be considered even if not as a separate claim per se. As the proposed decision states, complainant failed to sustain her burden of proof with regard to the underlying facts as to this issue.

The Commission also will address several legal issues discussed in the proposed decision. In its discussion of causation in FEA cases of this nature, the proposed decision refers to complainant's utilization of the term "determining factor" used in Kovalic v. DEC International, Inc., 161 Wis. 2d 863, 874, 469 N.W. 2d 227 (Ct. App. 1991). This discussion is essentially moot, because it has been concluded that illegal discrimination played no role at all in this case. However, to avoid possible confusion, the Commission notes that the Wisconsin approach to mixed motive questions in WFEA cases is set forth in Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W. 2d 234 (Ct. App. 1994).

In a discussion of complainant's claim of "hostile or offensive work environment and sexual harassment," the proposed decision cites §111.36(1)(b), Stats. This subsection prohibits an employer from engaging in sexual harassment "or permitting sexual harassment to have the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile, or offensive work environment." The "sexual harassment" referred to in this subsection is either the "quid pro quo" variety or unwelcome conduct of a sexual nature, as defined in §111.32(13), Stats. The complainant is not alleging either of these types of sex discrimination, but rather disparate treatment on the basis of sex with respect to "terms, conditions or privileges of employment," §111.36(1)(a), Stats., and/or what can be characterized as harassment on the basis of gender of a nonsexual

nature, in violation of §111.36(1)(br), Stats.¹ Therefore, the proposed decision's citation to §111.36(1)(b), Stats., is technically inapposite. However, since the proposed decision refers to §111.36(1)(b) for the definition of "substantial interference with an employe's work performance or creation of an intimidating, hostile or offensive work environment," the definition of this term is identical in both §§111.36(1)(b) and 111.36(1)(br), and complainant did not establish sex discrimination under any of these theories, the citation to §111.36(1)(b) rather than §111.36(1)(br) has no material significance.

In its conclusion on page 18, the proposed decision states that the employment decisions in question "were reached after a refined process of investigation and tenure track appointment review and rereview. Accordingly, the Commission should be guided by an appropriately deferential standard." Complainant objects to this statement as follows:

One is ... left to wonder how the Commission can defer, in a discrimination case, to decisions that did excluded an [sic] consideration of discrimination issues. It is clearly erroneous to ascribe any weight to the University's decision because it did not consider the issues before the Commission. Plaintiff's claims are based on illegal discrimination, not on failure to follow contract procedures, the only issues that the University process took into consideration. Complainant's objections to proposed decision and order, p. 16.

The Commission believes complainant misapprehends the proposed decision's use of the term in "deferential standard." The Commission does not view this as a reference to any conclusion respondent may have reached in-house about discrimination, but rather to the academic related decisions that bore on complainant's employment at UW-Stout.

In any event, and to avoid possible confusion, the Commission will state that in a discrimination case of this nature, it would be more apt to say that the

¹ This subsection provides: "Engaging in harassment that consists of unwelcome verbal or physical conduct directed at another individual because of that individual's gender, other than the conduct described in par. (b), and that has the purpose or effect of creating an intimidating, hostile or offensive work environment or has the purpose or effect of substantially interfering with that individual's work performance. Under this paragraph, substantial interference with an employe's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employe would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment."

Commission must give appropriate weight to the academic and pedagogical judgments of the academics who are in the best position to make these kinds of evaluations, and who have followed a process the university has developed to provide a careful method of evaluation of these factors, cf. Univ. of Pennsylvania v. EEOC, 493 U.S. 182, 198-99, 107 L. Ed. 2d 571, 588, 110 S. Ct. 577, 51 FEP Cases 1118,1124-25 (1990) ("In keeping with Title VII's preservation of employers' remaining freedom of choice [i.e., freedom to use employment criteria not proscribed by Title VII] courts have stressed the importance of avoiding second - guessing of legitimate academic judgments." (citation omitted)); Brown v. Trustees of Boston University, 891 F. 2d 337, 51 FEP Cases 815, 832 (1st Cir 1989) ("The district court gave several instructions . . . that sufficiently advised the jury that it was not to substitute its own judgment on the merits of Brown's tenure candidacy for that of the University.")

Complainant disagrees with many factual aspects of the proposed decision. While the Commission will not address each of them, it has considered all of complainant's objections in this regard and has concluded that no changes are warranted.

Complainant objects to a reference in the proposed decision to "evidence showing increased female faculty and student participation in the College of Engineering and UW-Platteville," pp. 15-16, proposed decision and order. Complainant cites certain statistics she contends conflict with this characterization. However, UW-Platteville Affirmative Action Officer testified that approximately 10% of the faculty in the College of Engineering is female, and there was no underrepresentation of women. In complainant's department, two of the four faculty members were female.

Complainant also asserts that Acting Chancellor Holgren "testified that the URST decision would have influenced his decision." Objections, p. 9. However, the hearing tapes include the following testimony by Acting Chancellor Holgren:

Q Assume for a minute that you had somehow been informed about the URST action, would that have altered your decision to issue the non-renewal notice?

A: I think not. Of course, one can't tell. But my sense is, with the knowledge that I had of her teaching effectiveness and certainly the black-and-white nature of the stipulation for a Ph.D., I think the requirement -- I would very likely made the same decision. I,

as either Provost or Acting Chancellor, do not always go along with the URST or recommending body.

Also, it was clear from the record that the Chancellor (in this case the Acting Chancellor) has the sole authority to decide on the issue of faculty renewal, and is not obligated to follow the recommendations of any of the faculty bodies that can play a role in the renewal process.

Complainant also asserts that "[t]he proposed decision assigns the student evaluations much more weight than any of the witnesses did. All of the witnesses who testified denied that student evaluations were a factor in Pioro's termination." Objections, p. 11. However, Dr. Balanchandran testified that he relied in the past on formal and informal feedback from students in evaluating teaching effectiveness. Dean Yeske testified that students know more about the skills of faculty than faculty peers, because the students are in the classroom every day. A Board of Regents policy (complainant's Exhibit 88), while recognizing that student evaluations "must not be a substitute for direct peer judgment of teaching effectiveness through a variety of means," stresses that "[i]n assessing teaching effectiveness ... student evaluations are an important and useful source of evidence which should be considered in reaching judgments."

In conclusion, the decision not to retain complainant was based on two factors. The first was her failure to have completed her Ph.D. by the date to which she contractually agreed. The second was respondent's concerns about her teaching effectiveness, the evidence of which included routine student evaluations and a petition filed by a group of students with Dean Yeske. The validity of these underlying bases have never been controverted in any meaningful way, and complainant has not identified any similarly-situated faculty members in different protected groups who were treated differently.

Furthermore, the primary actor in respondent's decision on nonrenewal was Dean Yeske, a person of Czechslovakian and Polish origin. There is no appreciable evidence in this record to support complainant's contention that he was prejudiced against her because of her Polish origin. Complainant's theory is that Dean Yeske was ashamed of his own Polish origin, and because of this he was prejudiced against other Poles. She bases this theory on her perception that Dean Yeske seemed uneasy and was cold to her when they were first introduced at a faculty gathering and he was told of their common heritage. She also perceived that after that he seemed uncomfortable

and condescending toward her, and was often annoyed at positions she took as a member of the CRST committee. She also cited Dean Yeske's vote against a salary increase for another Pole on the faculty (Dr. Lukowski), but there was no showing that this vote was lacking in justification or was otherwise probative of bias. Finally, she contends that Dean Yeske was evasive about his national origins in his hearing testimony. There is simply nothing in the record to support complainant's theory about Dean Yeske's alleged anti-Polish bias except for her own perceptions and fragments of evidence that are completely unpersuasive.

ORDER

The attached proposed decision and order, with minor editorial changes and as augmented by the foregoing discussion, is adopted as the Commission's final resolution of this matter, and this complaint is dismissed.

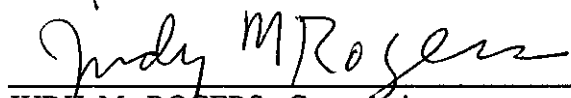
Dated: April 16, 1996.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:pf


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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

* * * * *

BARBARA NOWACZYK-PIORO,

Complainant,

v.

President, UNIVERSITY OF
WISCONSIN - Platteville,

Respondent.

Case No. 93-0118-PC-ER

* * * * *

PROPOSED
DECISION
AND
ORDER

This matter is before the Commission on a complaint of age, national origin or ancestry, and/or sex discrimination; and/or a complaint of retaliation. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. The complainant, Barbara Nowaczyk-Pioro, is a female, born in Nowy Tarq, Poland on September 18, 1944.
2. After completing course work for master's degrees in civil engineering and architecture at the Warsaw Polytechnic Institute, Warsaw, Poland, and working as an assistant architect restoring historic buildings, in 1968 Pioro moved to England, where she was employed by Ove Arup and Partners of London as a consulting engineer in design.
3. In 1970 Pioro moved to Toronto, Canada, joined Renco Engineering as a design engineer and, with advanced standing, entered the undergraduate civil engineering program at the University of Toronto.
4. Pioro received her bachelor's degree from the University of Toronto in 1972, and began working for KR Engineering designing shopping plazas and smokestacks.
5. Between 1974 and 1987, Pioro worked as a structural engineer for Underwood McClellan, an engineering firm in Toronto, Canada. There she designed strip shopping malls, sewage treatment plants, reservoirs and fish hatcheries. Pioro also engaged in consulting work.

6. While at Underwood, Pioro became a licensed professional engineer in 1974 and began studying for a master's degree in industrial engineering.

7. Pioro received a master's degree in industrial engineering from the University of Toronto in 1980 and continued studies there in pursuit of a doctoral degree. Most of the work for this degree involved research for the dissertation. Actual course work included three courses.

8. Pioro worked on research for her dissertation on human error from 1980 to December 1990.

9. In 1990 Pioro sought and was hired by respondent, the University of Wisconsin - Platteville (UW-P) for one semester as an academic staff lecturer beginning in January 1991. Dr. Swaminathan Balachandran, Chair of the Industrial Engineering (IE) Department, made the selection.

10. The UW-P had pursued a policy of requiring a tenure-track faculty member to hold a terminal degree or have a stipulation for completing that degree, since Dr. Lee Halgren's arrival as Vice Chancellor in 1984. This was due partly to criticism of UW-P from the North Central Accrediting Agency regarding the quality of its faculty.

11. This requirement for a doctorate became increasingly critical in the College of Engineering (COE) where it relied heavily on accreditation from the Accrediting Board for Engineering and Technology (ABET) to give credence to the quality of its engineering program. ABET preferred and suggested that all faculty members hold a doctorate.

12. Balachandran was aware of the UW-P terminal degree policy and his college's (COE) particular concerns about it. So, prior to selecting Pioro, he called one of Pioro's thesis advisors and was informed she was close to completing her thesis. This information played an important part in his decision to select her.

13. Balachandran and his wife assisted Pioro in getting settled in her Platteville apartment, including taking her shopping when she had no car.

14. Pioro's relationship with Balachandran during her first semester -- spring 1991 -- was amicable. Pioro and Balachandran with his wife invited each other to parties they held for students and faculty and they attended them. At the end of the semester, Pioro obtained a ride with Balachandran and his family to Madison for her flight to Canada.

15. In the summer of 1991, Balachandran was authorized to recruit for a probationary (tenure-track) faculty position.

16. Using the same pool of candidates from his prior search, Balachandran contacted Pioro, told her about the position, and after she expressed interest, specifically asked her when she would complete her doctoral degree.

17. Pioro assured Balachandran that she had completed her course work and could complete her thesis by the end of summer 1991.

18. This was confirmed by Pioro's thesis advisors, but they suggested August 1992 as a better deadline.

19. Balachandran again called Pioro, advised her of his conversations with her advisor, and asked her to select a date. She selected August 20, 1992, as her deadline for completing her terminal degree.

20. In July 1991, Pioro accepted a position as a probationary faculty member for the 1991-92 academic year.

21. The contract of appointment signed by Pioro on July 29, 1991, among other things, included this provision:

If the Chancellor's office does not receive, by August 20, 1992, official verification that you have completed all requirements for the Ph.D. degree, your appointment will not be renewed beyond the 1992-93 academic year.

22. Beginning in 1988, every person without a doctoral degree hired to a probationary faculty position was hired with a similar contractual provision, requiring the completion of the doctoral degree by a certain time.

23. When Pioro arrived on campus in the fall of 1991 with a one-year tenure-track appointment, Balachandran, as her department head, advised her of the process for effecting continuation of the appointment.

24. Balachandran advised Pioro of the various groups and levels of faculty evaluation, how to build her DRB (Departmental Review Body) folder regarding her activities and how student evaluations were used to evaluate faculty, all used in considering reappointment each year. Balachandran provided Pioro his DRB folder as a sample.

25. As a part of a formal UW-P mentoring program beginning in 1989 or 1990, Balachandran, on recommendation of the COE dean, was appointed by Vice Chancellor Halgren to serve as mentor to Pioro.

26. Interim Dean Joanne Wilson advised Balachandran to concentrate his mentoring activities into four major areas: teaching, professional development, RST (Rank, Salary and Tenure) procedures, and community and social activities.

27. Anticipating the mentor appointment, Balachandran scheduled and held two sessions with Pioro in late August 1991. In those sessions Balachandran discussed his teaching experiences, including suggestions on interacting with colleagues, bridging cultural differences, and relating to the UW-P student and preempting problems with them.

28. After the second mentoring session, Balachandran advised Pioro that he believed the responsibility was complete except as to receiving feedback from her and responding to any request from her for assistance.

29. As department head, Balachandran also supervised Pioro. These activities included overseeing Pioro's Human Performance Laboratory duties, scheduling classes, and observing lectures for his annual performance evaluation.

30. Balachandran evaluated all faculty in his department on the basis of his classroom observations at lectures in each of their courses and student feedback.

31. From the spring semester 1991, Balachandran provided Pioro with notes of student complaints, access to his written comments regarding his observations at her lectures, and shared his teaching experiences with her.

32. At the end of the fall semester 1991, Balachandran orally advised Pioro that student complaints regarding her teaching hampered her chances for contract renewal. Later, by memorandum dated January 24, 1992, Balachandran advised Pioro that student evaluations placed her at the bottom of COE faculty evaluations, but he considered her teaching effectiveness to be average. Balachandran also urged Pioro to complete her Ph.D. on or before the stipulated deadline.

33. After Balachandran's evaluation in early 1992, Pioro was evaluated by the DRB, the College Rank, Salary and Tenure Body (CRST), and the University Rank, Salary and Tenure Commission (URST); each body recommended retaining Pioro for the following year.

34. By letter dated March 5, 1992, the Chancellor reappointed Pioro to the UW-P faculty for the 1992-93 academic year, from August 23, 1992 through May 22, 1993.

35. Also in March or April 1992, the Dean of General Engineering, John Krogman, had two meetings with Balachandran to discuss complaints from GE students about Pioro.

36. In May 1992, Balachandran was called to COE Dean Ronald Yeske's office to discuss a petition he had received from twenty-two students regarding Pioro's teaching performance.

37. On May 14, 1992, Dean Yeske met with Pioro to discuss her progress toward promotion and tenure in the college. He advised Pioro of the petition from students in her Engineering Economics class protesting her teaching; reminded her that teaching experience was a component in considering tenure, promotion or retention; and that it was paramount for her to complete her Ph.D. degree in August.

38. After her meeting with Yeske, Balachandran, having received a copy of the student petition, met with Pioro to discuss it.

39. Near spring recess in May 1992, Balachandran gave Pioro her DRB folder, with a list of items he wanted to see in her folder in the fall. The items included her progress on her Ph.D. degree, any request for an extension of time for completion of her doctoral degree and letters of support from her thesis advisors for extending this deadline.

40. In June 1992 Pioro received notification from Acting Chancellor Halgren that she would receive merit increases effective August 23, 1992, and June 1, 1993, and a quality reinvestment catch-up increase for 1992-93.

41. Pioro did not teach at UW-P during the summer of 1992.

42. Pioro failed to complete her doctoral degree as stipulated in her appointment contract by August 20, 1992.

43. In September 1992, by memorandum Balachandran advised all IE faculty of the fall time schedule for the DRB, CRST and URST review proceedings. He specifically alerted Pioro, his only incoming second-year faculty member, to update her DRB folder for consideration by the DRB on the issue of her retention.

44. The IE DRB met on November 10, 1992. Balachandran did not attend but submitted a memorandum recommending retention of Pioro, provided she met five conditions: (1) Immediately submit a report on progress toward terminal degree, (2) submit letters from her major advisors confirming progress, (3) stipulate that renewal will be by terminal appointment if she failed to complete Ph.D. by August 31, 1993, (4) each semester submit a report

regarding progress toward terminal degree and (5) substantially improve her teaching effectiveness.

45. Dr. Balachandran's recommendation reflected the consensus of the IE faculty.

46. Having determined to recommend to the Chancellor the non-retention of Pioro beyond the current year, Yeske requested to appear before the DRB to advise them of his position on this issue.

47. The DRB invited Yeske to speak at the November 10, 1992, meeting. At the meeting Yeske informed the body of his decision to recommend to the Chancellor that Pioro not be retained beyond her current contract.

48. In explanation of his decision, Yeske informed the body of Pioro's failure to satisfy her stipulated agreement to complete her Ph.D. by August 20, 1992, and of his concerns about her teaching performance demonstrated by a student petition in May, 1992.

49. At the IE DRB meeting, only two written pieces of information about Pioro were on the table: Balachandran's recommendation and Pioro's current teaching evaluation by the students. Pioro had not provided the DRB group her DRB folder.

50. During the meeting, the IE DRB decided by vote not to renew Pioro's contract for the reasons that she had failed to fulfill her contract by completing her Ph.D. degree by August 20, 1992, and indicators showed her teaching was deficient.

51. The IE DRB advised Pioro by memorandum dated November 11, 1992, of its decision not to renew her contract, the reasons for same, and information about her rights to appeal the decision.

52. As provided in RST procedures, Pioro requested reconsideration of the DRB decision not to retain her. In her written request, Pioro stated that on several occasions "the Department chair" told her that November 12, 1992,¹ was the deadline for submitting her file and questioned whether Yeske's appearance at the November 10, 1992, meeting was standard procedure.

¹ Respondent's Exhibit 19 indicates that on September 18, 1992, Balachandran advised all IE faculty to "update [their] DRB folders as soon as possible"; that November 12, 1992, was the date DRB would send files and recommendations for second-year faculty to CRSTC; and on October 19, 1992, reminded all IE faculty to return their files to the IE office "ASAP".

53. The following day, December 1, 1992, Balachandran wrote the DRB disputing Pioro's claim that he had advised her November 12, 1992, was the deadline for submitting her file to that body. Balachandran also disputed other statements made by Pioro in her letter requesting reconsideration and enclosed written documentation.

54. Before the DRB reconsideration, Yeske wrote and informed the DRB that, regardless of their decision, he planned to recommend to the Chancellor that Pioro's appointment be concluded at the end of the spring semester.

55. Also, before Pioro wrote to request reconsideration, Balachandran withdrew his conditional recommendation for renewal and recommended non-retention in two letters to the DRB.

56. When the DRB met on December 1, 1992, and affirmed its decision not to renew Pioro's appointment, it had also received written information from Pioro.

57. The CRST met later on December 1, 1992, and endorsed the decision of the IE DRB not to retain Pioro beyond the spring semester. Yeske was the Chair and ex officio, non-voting member of that committee.

58. Yeske notified Pioro by memorandum dated December 1, 1992, of the CRST decision regarding her retention and informed her of her remaining rights of appeal.

59. Exercising her rights, Pioro wrote CRST on December 7, 1992, requesting written notification of the reasons for their decision and reconsideration. The next day the CRST met and responded to Pioro's request.

60. That same day Yeske wrote the Acting Chancellor, Lee Halgren,² voicing his recommendation as Dean of COE not to retain Pioro.

61. Pioro continued to appeal her non-renewal, as provided by UW-P and University of Wisconsin System procedures through March, 1993:

- A. On December 10, 1992, Halgren, the Acting Chancellor, wrote Pioro advising her that he concurred with the recommendations of the IE DRB, the CRSTC, the Dean of COE and the Acting Provost and Vice Chancellor not to renew her appointment and that her employment would terminate on May 22, 1992.

² Dr. Lee Halgren, Provost and Vice Chancellor for Academic Affairs at UW-P since 1988 or 89, began as Vice Chancellor in 1984. For 14 months between 1992 and 1993, Halgren served as Acting Chancellor of UW-P.

1. Halgren made this decision between December 7 and 12, 1992. At that time he was not aware that the URST³ had voted in favor of retaining Pioro for the 1993-1994 academic year in a meeting on December 7, 1992, which adjourned at 4:15 p.m.
 2. Halgren moved forward with his decision because of a December 15, 1992, timeline requirement of UW System, Wis. Adm. Code.
- B. As Chief Executive Officer of UW-P, Halgren was not bound by recommendations from any advisor groups, including the various RST committees or commissions. He did not change his decision subsequent to learning about the URST decision.
- C. On December 18, 1992, the CRST Committee voted 4 to 1 to reaffirm its December 1, 1992, decision not to retain Pioro.
- D. Just before Christmas 1992, Pioro met with the Acting Chancellor and Patricia Doyle, Assistant to the Chancellor for Affirmative Action and Women's Services, in a meeting arranged by Doyle, where they discussed Pioro's remaining appeal rights and her concerns about gender climate in the IE department and her interaction with Balachandran.
1. The three decided to keep the issues of reappointment and department climate for women separate and not address the reappointment issue on the basis of gender bias.
 2. Doyle suggested investigating IE gender issue after reappointment appeals. Pioro agreed.
 3. In response to Pioro's prior written request to reconsider his decision, Halgren advised Pioro he would accept the recommendation of the U.W. Faculty Appeals Commission regarding her nonrenewal.
- E. After the meeting with the Acting Chancellor and Doyle in late December 1992, Pioro appealed her nonrenewal to the UWP Faculty Appeals Commission (FAC) under UWS 3.08, Wis. Adm. Code.
1. FAC was established by UWP to satisfy the §UWS 3.08, Wis. Adm. Code requirement for providing a review of a nonrenewal decision by an appropriate standing faculty committee on written appeal by the concerned faculty member.
 2. Under §UWS 3.08, Wis. Adm. Code, the scope of review was limited to whether the decision was based "in any

³ The URST Commission met on December 7, 1992, to consider Pioro, who had been recommended for non-retention by IE, DRB and CRST.

significant degree" on activity or beliefs protected by the constitution or by the principles of academic freedom, or because there was improper notice of nonrenewal.

- F. By memorandum dated March 23, 1993, FAC advised Acting Chancellor Halgren that after holding a hearing the panel determined Pioro had not fulfilled her contractual obligation to complete her terminal degree by August 20, 1992, but that IE and IE DRB had not followed the guidelines for retention, therefore it recommended a terminal contract for the 1993-94 academic year.
- G. On March 30, 1993, the Acting Chancellor rescinded Pioro's letter of termination and appointed her to a one-year terminal contract ending on May 21, 1994.

62. In late April or early May 1993, Doyle began conducting an investigation of Pioro's allegations about IE and IE Chair Balachandran.

63. Doyle advised the COE Dean and the IE Chair that she was beginning her investigation, reviewed the exit interviews of Patricia Rummel, a female assistant professor in IE from January 1987 to May 1988, and Silvanus Udoka; and interviewed Shiv Tandon, Chair of FAC, and Jill Clough, the other female faculty member in IE.

64. Doyle scheduled appointments with Phillip Sands, Associate Professor in IE, and Pioro but became ill and cancelled the appointments.

65. After surgery and returning to work, Doyle scheduled another appointment with Pioro, but she did not keep it. Pioro left for the summer and Doyle discontinued the investigation after Pioro filed a complaint with this Commission in July 1993.

CONCLUSIONS OF LAW

1. This matter is before the Commission under §230.45(1)(b), Wis. Stats.
2. Complainant has the burden to show she was discriminated against by respondent on the basis of age, sex and/or national origin and/or was retaliated against in violation of the Wisconsin Fair Employment Act (WFEA).
3. Complainant has failed to sustain her burden of proof.
4. Complainant was not discriminated or retaliated against by respondent as alleged.

OPINION

The issue in this matter is whether respondent, University of Wisconsin - Platteville, discriminated against complainant Barbara Nowaczyk-Pioro on the basis of age, sex or national origin in connection with her employment at that university or retaliated against her for engaging in fair employment activities.

Following the method of proof established in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), the complainant must first establish a prima facie case of discrimination by showing: (1) she was a member of a protected class, (2) she suffered an adverse employment action, and (3) non-protected class members were not treated similarly. Upon establishing a prima facie case, the burden of production shifts to the respondent to articulate legitimate, non-discriminatory reasons for its alleged unequal treatment. After this is established, the burden shifts back to the complainant to prove respondent's articulated reasons are a pretext for unlawful discrimination. Even though the burden of production shifts, the burden of persuasion remains continuously with the complainant.

Complainant argues, citing Kovalic v. DEC Int'l, Inc., 161 Wis. 2d 863, 874, 469 N.W. 2d 224 (Ct. App. 1991), a case involving ADEA, that she must only prove the illegal discrimination was a "determining factor," not the only factor in respondent's adverse employment action. Kovalic cites La Montagne v. American Convenience Prods., Inc., 750 F. 2d 1405, 1414 (7th Cir. 1984) for this legal construct.

In Gehring v. Case Corp., 43 F. 3d 340, 66 FEP Cases 1373 (CA 7 1993), in response to an issue of jury instruction error, the court said: "How 'determining factor' entered the vocabulary of age discrimination is a mystery. The term does not appear in the Age Discrimination in Employment Act, and the Supreme Court has never used it in a case under ADEA." After stating that these words lacked legal meaning, the court explained why the term did little for jury instructions. The court concluded by saying: "The legal question is straightforward and may be explained without reference to words such as 'determining factor.'" The Commission holds to this view.

I. Age Discrimination

Complainant's claim of age discrimination appears⁴ to be based on her allegation that Dr. Balachandran frequently said she was "too old" to establish a rapport with the students. Mr. Pioro testified this occurred most frequently when Balachandran was discussing interrelations with students. He often talked about the generation gap and the necessity to overcome that actuality. Pioro testified that on one occasion during an IE committee meeting, Balachandran said the recent hire of a faculty member was good because he was young and could relate to students. No other evidence was presented by complainant on this issue.

The record shows that Ms. Pioro's testimony about comments made by Dr. Balachandran about age in connection with student rapport are subject to interpretation. It is not clear from Pioro's testimony whether Balachandran actually said she was "too old" to get along with the students, or that there was a generation gap and a need to establish rapport with the students.

Also, these comments by Balachandran were made, except as noted, while he was suggesting ways Pioro could improve her relationship with students, based on his own success with them. By Pioro's testimony, Balachandran had good rapport with the students.

Both Balachandran and Pioro are members of the protected class for age and are within two years of being the same age. In view of the circumstances, ambiguity and context of these alleged comments, it is doubtful that these comments standing alone are sufficient to establish a prima facie case of age discrimination. Balachandran had on two occasions recommended Pioro's hire and initially had recommended her retention.

II. Sex Discrimination

Three more common forms of sexual harassment are: (1) quid pro quo, which occurs when an employer demands sexual favors, under threat of adverse job conditions; (2) a sexually hostile work environment, which occurs when the conduct has the purpose or effect of interfering with work performance, or creating an intimidating, hostile or offensive working environment; and (3) when the conduct is gender-based. Again Ms. Pioro has

⁴ In her brief, complainant makes no specific argument on age discrimination. Instead, complainant discusses her claims of discrimination in connection with her relationships with Dr. Balachandran and Dean Yeske.

not stated a particular legal theory under this claim, but it appears to be based on allegations regarding the behavior of Dr. Balachandran.

Ms. Pioro claims her problems with Dr. Balachandran began in the fall of 1992. Pioro had been appointed as a tenure-track faculty at UW-P and Balachandran was appointed as her mentor. Ms. Pioro testified that during their frequent mentoring sessions Balachandran berated her for being "too Canadian" or "too European" or "too different;" criticized her clothes as not "professional;" questioned her relationship with her husband, who lived in Toronto; and told her she worked too much and did not have enough "private life." Complainant Pioro also testified that Dr. Balachandran told her of how he had counseled his wife and children and how they had benefited from it.

In addition to problems during mentoring sessions, Ms. Pioro testified that Dr. Balachandran humiliated her when he belittled her in front of students; entered her locked office and searched through items; and opened books mailed to her, claiming they were his.

In support of these allegations, Ms. Pioro directs attention to M.E. Professor Kurt Rolle, who testified that in late October 1992, while assisting Ms. Pioro in her office, he witnessed Dr. Balachandran making comments to Ms. Pioro which caused him to become upset and he believed they were inappropriate to be said to a colleague. Ms. Pioro also points to the testimony of Dr. Shiv Tandon and Ms. Ramaiquia Ghayyad.

Ms. Ghayyad testified that while a student at UW-P in 1987 she called in response to an ad for a clerical position in IE, but was dismissed as a candidate by Dr. Balachandran after he determined she was married and had small children. Dr. Tandon, a native of India like Dr. Balachandran, testified that his comments to Patricia Doyle in May 1993 about Dr. Balachandran, Indian culture, and how he related to women was not based upon observation.

Also, Ms. Pioro references the stipulated deposition of Patricia Rummel as strong support of her claim of sex discrimination. Ms. Rummel and her husband, Thomas Holland, were both appointed to tenure-track positions in the UW-P IE Department in January. At that time, the UW-P Chancellor was William Chmurny; Ross McDonald was COE Dean; and S. Balachandran, the IE Department Chair.

In May 1988, Ms. Rummel resigned. By letter dated May 23, 1988, she explained her reasons for resigning. Rummel wrote that she had attempted to upgrade the quality of IE curriculum by teaching courses and requiring high

level academic standards, but had been stymied by resistance from students and resistance from the departmental administration. Rummel wrote that she was cautioned to keep students happy; forced to battle for laboratory space and resources; assigned duties, but denied authority for their administration; and fought vainly for office security for examinations and personnel files, as students were allowed access to anything they desired.

About experiencing discrimination, she stated that it was both subtle and insidious and therefore could not be cited in a civil action. Rummel described examples of such incidents as follows:

1. A statement by the department head that neither Tom Holland or I could be considered for promotion or tenure before the other, and that neither could be considered before the seven year time limit, regardless of differences in performance rating in any phase of academic performance.
2. A caution to me by the department head in February of 1988 that I should not submit a research grant proposal for SAIF because "Tom should have the chance to get one." Such a statement would never have been made to the male half of a married couple and is, on inspection, even more insulting to Tom than to me.
3. A persistent effort to lock me into two lower level courses despite my ability and qualifications to teach many courses in the program competently. Specialization is fine in a graduate setting where several courses exist within a single field, but can quickly lead to stagnation of a program where the depth which makes such specialization attractive is not available.

During her deposition, under cross examination, Ms. Rummel stated that her UW-P academic appointment, like Holland's, included a proviso that she complete her Ph.D. before December 20, 1988, but she had not completed it prior to resignation; that she was the principal author of papers co-authored with her husband and believed it inappropriate to place his name first on such papers; that she believed herself to be a better instructor than her husband and should be considered for tenure before him; that she also taught upper level courses and did not know the mix of lower and upper level courses she taught; that she had received the SAIF grant the summer prior to when Dr. Balachandran suggested that "[her husband] should have a chance to get one;" and that she received more and higher salary increases than others including her husband; and consistently received good evaluations, grant awards and honors, offers of renewal and letters of recommendation.

Ms. Rummel, in her deposition, stated that she had a meeting with Dr. Balachandran about every three weeks and on at least one occasion, in November 1987, expressed her beliefs of sexism in the department and the college. When Balachandran offered to apologize if anything he had done was sexist and attempted to change, believing he was not capable of changing his attitudes, Rummel stated that she told him an apology would not change anything and he was not the only guilty one.

Thomas Holland and Phillip Sands were the only other males in the department. Rummel had conflicts with Sands over lab time and believed he occasionally exhibited sexism. Ms. Rummel stated that Balachandran occasionally called Holland at home and had a meeting with him when he had difficulties, but that she did not know the frequency of Balachandran's contacts with Sands, who was half-time with the Dean or Ms. Jill Clough, the other female department member. Ms. Rummel received a Doctor of Engineering degree from Texas A&M University in 1991. Mr. Holland resigned from UW-P in December 1988; he had not completed his doctorate degree.

Dr. Balachandran testified that he and his family befriended Ms. Pioro upon her arrival in Platteville and throughout most of her UW-P employment; that from the start of Pioro's employment until mid-1992, he made about fifteen telephone calls to Ms. Pioro at her home and all but two pertained to business; that he went to Ms. Pioro's apartment four times, twice for parties and twice with his wife to deliver pillows and a sofa.

Dr. Balachandran testified that his work relationship with Ms. Pioro was amicable until his amended renewal recommendation in November 1992; that in December, Pioro wanted him to join with her and others against Dean Yeske, but he refused; that the confrontation with Pioro, witnessed by Rolle, occurred in December 1992, and involved materials left for grading in Pioro's mailbox by students who had unsuccessfully waited to see her that morning; and that Ms. Pioro threatened him with legal action.

The other female faculty member in the IE Department was Dr. Jill Clough. Ms. Clough was appointed to an academic tenure-track position in 1987. She had not begun work on a Ph.D. and was given the maximum probationary period of seven years to complete her terminal degree. In 1991 Ms. Clough requested and was granted a leave of absence, stopping the probation clock. She completed her Ph.D. in May 1993, four or five months after her original contract deadline.

Ms. Clough testified that she had conflicts with Dr. Balachandran, that he prodded and pushed her, but their discussions were candid. Clough stated that she believes Balachandran's actions were because she was a young faculty person and not based on her gender.

Ms. Pioro makes the point that Assistant Professor John Krogman, Chair of the Division of General Engineering, began employment at UW-P in 1986, was tenured in 1991, and does not hold a doctoral degree. However, the evidence adduced establishes that Krogman's appointment contract had no Ph.D. provision; that General Engineering does not grant a degree and is not ABET accredited; that because this division does not grant a doctoral degree it is not needed; and that Krogman was tenured because of his outstanding record as an instructor.

Ms. Pioro's allegations and evidence presented as to her relationship with Dr. Balachandran as IE Department chair and her mentor, suggests a claim of "hostile or offensive work environment" sexual harassment. Under this claim Ms. Pioro must establish "that a reasonable person under the same circumstances as the employe would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment."⁵

§111.36(1)(b), Wis. Stats. The evidence presented by Ms. Pioro does not meet this standard. Instead the clear evidence shows that Dr. Balachandran made every effort in an attempt to assist Ms. Pioro in her teaching and her tenure appointment. This relationship between faculty member and department chair mentor was friendly and remained so, until Dr. Balachandran finally sided with his supervisor, Dean Yeske, not to recommend Ms. Pioro's reappointment. At that point, Ms. Pioro registered her first complaint against Dr. Balachandran and the IE Department.

Even less compelling is the evidence adduced by complainant as to a "hostile environment" claim against the College of Engineering or the University. It was equivocal, abstruse and based on innuendo. Little evidence of a concrete nature was presented and it was overshadowed by other evidence

⁵ Wis. Stats., §111.36. Sex, sexual orientation; exception and special cases. (1) Employment discrimination because of sex includes, ... (a) ... (b) Engaging in sexual harassment; ... ; or permitting sexual harassment to have the purpose or effect of substantially interfering with an employe's work performance or of creating an intimidating, hostile or offensive work environment.

showing increased female faculty and student participation in the College of Engineering and UW-Platteville.

To a lesser degree, Ms. Pioro presented evidence that might be interpreted applicable to a claim of discrimination against an individual with respect to compensation, terms, conditions or privileges of employment because of gender. But here, Ms. Pioro failed to introduce any evidence showing that she or other female colleagues were treated differently from male faculty members by Dr. Balachandran, the College of Engineering or the University.

Based on the record, clearly this is not a case involving sexual misconduct or sex impropriety.

III. National Origin Discrimination

Ms. Pioro's claim of national origin discrimination centers on her interaction with Dean Ronald Yeske. Dean Yeske was born October 28, 1946, and is a fourth generation American of Czechoslovakian and Polish origin. Dr. Yeske was appointed to the position of Dean of the College of Engineering in the summer of 1991. Yeske assumed those duties on November 17, 1991. Dean Yeske first met Ms. Pioro in August or September 1991 at a reception held by Chancellor Chmurny. They were both relatively new faculty.

Ms. Pioro testified that Dean Yeske "cringed" and walked away after being introduced to her by his wife and informed of their common heritage at the Chmurny reception, and from then on, she noticed that Dean Yeske felt uncomfortable with her, and treated her with condescension. Ms. Pioro also testified that in the spring of 1992, while sitting as a member of the CRST Committee, which Yeske chaired, Yeske voted against an inequity salary increase for Dr. Stanislaw Lukowski, a native of Poland, and was often annoyed with the position she took as a committee member.

Dean Yeske testified that he recalled nothing unusual about his conversation with Ms. Pioro at the Chmurny reception and that he voted against the salary increase because of Lukowski's poor teaching record. Dean Yeske testified that subsequently he had discussions with Lukowski, Lukowski recognized his problems and did things to improve his teaching. Yeske recommended tenure for Lukowski in 1994.

Dean Yeske testified he recommended nonrenewal of Ms. Pioro to a tenure-track position based on Pioro's teaching skills measured by student

evaluations and department evaluations, and her failure to comply with her appointment contract.

The evidence introduced by Ms. Pioro is insufficient to prove a claim of national origin discrimination.

IV. Retaliation

To make a prima facie case of retaliation, the complainant must show that (1) she engaged in a protected activity under WFEA, (2) she suffered adverse employment action subsequent to the protected activity, and (3) her protected activity and the adverse employment action were causally related.

Ms. Pioro introduced evidence that she filed a discrimination complaint against the respondent with the State Personnel Commission on July 13, 1993, and she was not given a teaching assignment for the ensuing academic year.

Other evidence shows the alternate assignment given Ms. Pioro conformed with the recommendation for reappointment for the 1993-94 academic year by FAC on March 24, 1993. Also, the decision was made by the Dean after consideration of Ms. Pioro's teaching difficulties, possible retaliation against students who had petitioned against her, and teaching needs.

The evidence does not sustain a finding of a causal connection between Ms. Pioro's protected activity and her assignment to administrative duties. However, even if a causal connection were shown, the respondent has articulated legitimate non-discriminatory reasons for her terminal appointment, and complainant has failed to prove such reasons are pretextual.

Ms. Pioro also argues that respondent retaliated against her by tampering or interfering with her witnesses. Complainant provided no legal basis for this interpretation of WFEA. Regardless, the witness' claim of threats was disputed by the alleged perpetrator and was insufficient to overcome the offered explanation.

V. Conclusion

Whether or not complainant proved her prima facie case by a preponderance of the evidence of age, sex and/or national origin discrimination, and/or retaliation, and it is doubtful, the respondent introduced evidence of legitimate, non-discriminatory reasons for its employment actions, including termination, with respect to complainant.

These decisions were reached after a refined process of investigation and tenure-track appointment review and re-review. Accordingly, the Commission should be guided by an appropriately deferential standard. Even so, respondent's articulated reasons for its actions were substantiated by the evidence and complainant failed to prove such articulated reasons were a pretext for unlawful discrimination.

ORDER

Complainant's claim of age, sex and national origin discrimination, and retaliation against respondent with respect to its employment actions toward complainant, including termination, are dismissed.

Dated: _____, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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