STATE OF WISCONSIN PERSONNEL COMMISSION

PETER E. KLEIN,
Complainant,

v.

DEPARTMENT OF AGRICULTURE, TRADE, AND CONSUMER PROTECTION
Respondent.

Case No. 95-0014-PC-ER

FINAL DECISION AND ORDER

This case involves a charge of discrimination on the basis of retaliation under the Fair Employment Act (FEA). The issue for hearing is set forth in the prehearing conference report dated July 18, 1996, as follows: "Whether respondent retaliated against the complainant for engaging in fair employment activities when respondent investigated him for a possible work rule violation in October of 1994."

FINDINGS OF FACT

1. At all material times complainant has been employed by respondent in the classified civil service in an unrepresented position as manager of the Northeast Region Office in the Division of Food Safety.

2. Complainant filed a complaint of WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) and "whistleblower" (Subchapter III, Chapter 230, Stats.) retaliation (Case No. 93-0110-PC-ER) with this Commission on July 7, 1993. That complaint asserted that respondent downgraded complainant's annual performance evaluation and took other adverse employment actions against him in retaliation for having testified in 1992 on behalf of another DATCP employe (Steve Stoner) in a "reverse discrimination" case, and for having written a memorandum to a supervisor in 1990 questioning an affirmative action hiring directive.

3. On February 8, 1994, a Commission investigator issued an initial determination concluding there was no probable cause to believe that complainant had been retaliated against as he had alleged. This case was dismissed after complainant appealed the initial determination but then decided not to pursue the matter.

4. On September 29, 1994, complainant attended a Division training session on gender communications. The trainer for this session utilized a confrontational

style, and there were a number of heated exchanges between the trainer and some of the employes at the session, including complainant.

5. At one point in the session, Laura Berkner-Murphy, another employe at the session, perceived that there was too much talking going on among other employes in attendance, and made a general request to "hold it down." She then perceived she heard complainant utter the word "bitch" at her, and she said to him that she had heard him.

6. During a break in the session she mentioned this incident to some other attendees, including Cheryl Anderson, the Director of the Bureau of Human Resources. On October 6, 1994, Ms. Berkner-Murphy was attending another meeting in Madison where this training session was discussed. She mentioned the incident involving complainant in the context of describing how poorly she thought the training had been received, and not with the intent of registering a complaint about it, although she considered the remark to have been improper. Among those present at this meeting was Peter Pawlisch, the Assistant Administrator of the Division of Food Safety.

7. Shortly after the foregoing meeting, Mr. Pawlisch discussed Ms. Berkner-Murphy's statement with Steve Steinhoff, the Administrator of the Division of Food Safety. They reached the conclusion that respondent should follow up on her allegation about complainant's remark even though she had not filed a formal complaint, because the allegation was essentially one of sexual harassment, there was relatively widespread knowledge of the matter, and a failure to act could contribute to the development of a hostile atmosphere in the context of sexual harassment, as well as possible liability by respondent.

8. Both Mr. Pawlisch and Mr. Steinhoff had been aware of complainant's protected activities related to his Personnel Commission complaint as set forth above.

9. Mr. Pawlisch then prepared a letter to complainant dated October 14, 1994, for Mr. Steinhoff's signature. The letter stated as follows:

> Your are directed to report to my office . . . on Wednesday, October 19, 1994, to discuss a possible violation of Department Work Rule # 10.
>
> All employes of the department are expected to conduct themselves in a professional and businesslike manner. The following acts are considered as unacceptable and could result in a disciplinary action.
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> Work Rules:
>
> > 10. Threatening, intimidating, inflicting injury, use of abusive language or otherwise discourteous actions toward fellow employes or the general public.

> Specifically, I wish to discuss the abusive language you directed to Ms. Laura Berkner Murphy at a Gender Communications training session on Thursday September 29, 1994.
>
> If you desire, you may choose to have a representative present during this meeting. Discipline may be taken as a result of this meeting.

10. At the time this letter was promulgated, Mr. Pawlisch and Mr. Steinhoff had not conducted any investigation into Ms. Berkner-Murphy's allegation beyond the discussion that had occurred at the October 6, 1994, meeting at which she made the allegation in Mr. Pawlisch's presence. Both of them had been present at the training session, but neither had heard the alleged remark by complainant.

11. The predisciplinary meeting occurred as scheduled on October 19, 1994. Complainant had retained, and appeared with, an attorney. Complainant was in pay status in connection with his appearance at the meeting. Mr. Steinhoff began the meeting by stating that it was a predisciplinary conference. He then explained that Ms. Berkner-Murphy had alleged that complainant had directed the term "bitch" at her at the September 29, 1994, training session, and said they were there to hear complainant's side of the story. Complainant denied having made the remark or having heard anyone else in the audience make the remark.

12. Following this meeting, Mr. Pawlisch spoke to a number of people who had been present at the training session. Only one person reported hearing the word "bitch" used in a manner consistent with Ms. Berkner-Murphy's allegation. Patty Hoppe submitted a statement dated October 19, 1994, which included the following: "There was more than the usual side conversations going on, Laura Berkner-Murphy turned to the table behind her asking for quiet as she could not hear the speaker. Someone from behind me, a male voice said 'bitch.' Pete Klein was directly behind me." Mr. Pawlisch also advised Ms. Berkner-Murphy that complainant had denied making the alleged statement, and asked her to submit a written statement. She declined to do so, explaining in a November 17, 1994, memo to Mr. Pawlisch as follows: "At this time, I cannot give a written statement regarding the incident . . . I have made this decision for two reasons, it would not be in my best interest, and I am satisfied with the manner in which I addressed Mr. Klein immediately after the incident."

13. Following the completion of their investigation, Mr. Pawlisch and Mr. Steinhoff concluded that on the basis of the evidence they had available they could not determine to a reasonable degree of certainty whether or not complainant had made the remark as alleged by Ms. Berkner-Murphy, and that no disciplinary action was war-

ranted. In a November 18, 1994, letter to complainant, Mr. Steinhoff stated as follows: "We have completed our investigation of a possible violation of Work Rule #10 by you. We have determined the evidence does not warrant discipline. The matter is closed." No record relating to the allegation was ever placed in complainant's personnel file.

14. During the time material to this matter, respondent did not have any official policy regarding disciplinary procedures to be utilized in the agency, other than as set forth in collective bargaining agreements.

15. The disciplinary procedure followed in complainant's case was not inconsistent with disciplinary procedures that had been used in other cases.

16. The disciplinary procedure followed in complainant's case was inconsistent with the disciplinary procedure recommended in training materials promulgated by the Department of Employment Relations (DER) primarily in that the initial meeting with complainant was denominated a predisciplinary hearing rather than an investigative hearing.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof and must establish by a preponderance of the evidence that respondent retaliated against him for having engaged in fair employment activities when he was investigated for a possible work rule violation in October 1994.

3. Complainant has not satisfied his burden.

4. Respondent did not retaliate against complainant for having engaged in fair employment activities when he was investigated for a possible work rule violation in October 1994.

OPINION

The framework for analysis of a charge of discrimination on the basis or retaliation is as follows:

> "The plaintiff must first establish a prima facie case of retaliation by showing that she engaged in a protected activity, that she was thereafter subjected by her emploer to adverse employment action, and that a causal link exists between the two . . . To show the requisite causal link, the plaintiff must present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action . . .

> Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.
>
> Once the plaintiff has established a prima facie case, the burden of production devolves upon the defendant to articulate some legitimate, non-retaliatory reason for the adverse action . . . The defendant need not prove the absence of retaliatory intent or motive; it simply must produce evidence sufficient to dispel the inference or retaliation raised by the plaintiff . . . If the defendant meets this burden, the plaintiff must then show that the asserted reason was a pretext for retaliation . . . The ultimate burden of persuading the court that the defendant unlawfully retaliated against her remains at all times with the plaintiff." *Chandler v. UW-LaCrosse*, 87-0124-PC-ER, 8/24/89 (citation omitted).

In the instant case, the only disputed element of a prima facie case involves the question of whether there was an "adverse employment action."[1] Prior to the hearing of this case, the Commission addressed this issue in denying a motion to dismiss for failure to state a claim. The ruling observed that:

> [T]he allegations in this case involve more than the employer conducting an investigation, or contemplating the imposition of discipline. The letter directing complainant to appear at a meeting to discuss a possible work rule violation can be construed as accusatory or even judgmental . . . Complainant alleges that respondent failed to follow established policies for handling disciplinary matters. Even though it appears to be undisputed that no formal discipline ensued, it cannot be concluded that there is no way the letter from respondent and the ensuing handling of the matter by management did not and could not have any adverse effect on appellant's conditions of employment. Whether or not it actually did or could have an adverse effect is a question that will have to await the development of a more complete record. Ruling on motion to dismiss, December 20, 1995, p. 3 (footnote omitted).

Section 111.322(3), Stats., makes it an act of employment discrimination "[t]o discharge or *otherwise discriminate against* any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." (emphasis added). Pursuant to §111.322(1), Stats., "it is an act of *employment discrimination* to . . . refuse to hire, employ, admit or license any individual, to bar or terminate from employment . . . or to discriminate against any individual in promotion, compensation *or in terms, conditions or privileges of employment.*" (emphasis added). It is clear that

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[1] In this case, this element of a prima facie case is also an element of a claim of retaliation. Therefore, the establishment of a prima facie case is of more significance than in a case where the only significance of the prima facie case is in its role as a tool of analysis, and where once the entire case has been tried on the merits, and the parties have fully tied the question of whether the employer's action was pretextual, the question of whether a prima facie case has been established "is no longer relevant." *U. S. Postal Service Bd. of Govrs. v. Aikens, 460 U. S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983).*

the actions of the respondent did not result in one of the discrete employment transactions specifically mentioned in the FEA. For example, complainant's employment was not terminated, and he was not denied a promotion he had sought. The question, then, is whether respondent's actions should be characterized as having affected complainant's "terms, conditions or privileges of employment."

The hearing did not establish that the notice of the predisciplinary hearing had any concrete, tangible effect on complainant's employment status. Complainant was given notice of the hearing and he attended it. All that happened after that was that management completed its investigation of the accusation against complainant, concluded that no disciplinary action was warranted, and informed him of this conclusion. No record of the matter was placed in complainant's personnel file. Furthermore, the complainant did not establish that management's actions left any kind of less definitive but still significant "residue," such as a "black mark" with respect to future upward mobility.[2] Furthermore, the Commission can not agree with complainant's contention in support of his position that the predisciplinary proceeding was an adverse employment action that he was diverted from his regularly assigned duties. Complainant was in pay status in connection with this process. The Commission is unaware of any authority that an employe's participation in investigative or predisciplinary proceedings initiated by management are not considered as part of the employe's duties.[3]

Although there is little case law in this area, some courts have held that investigative activities alone do not constitute actionable employment actions. For example, in *Thomas v. St. Luke's Health Systems, Inc.,* 869 F. Supp. 1413, 1435 (N. D. Iowa 1994), the Court held that a withdrawn request for a urinalysis did not amount to an adverse employment action:

> Thomas suffered no adverse employment action as the result of the withdrawn request for urinalysis, because it had no impact on his continued employment. Thomas's continued employment was not ultimately made dependent on a favorable result to the urinalysis; the urinalysis became irrelevant when it was withdrawn. Nor was Thomas ever again subjected to a request for a urinalysis. Thomas asserts that the withdrawal of the urinalysis undermined his employment position because he was unable to exonerate himself. However, the facts are undisputed that Thomas did not suffer any consequences to his employment in the form of demotion, termination, suspension, unusual or humiliating require-

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[2] This is not to suggest that such a showing is a necessary element to a claim of this nature, but is merely cited as an example of something that could advance such a claim.

[3] Assuming, *arguendo,* that participation in such proceedings by a professional employe could be onerous and extensive enough to create a significant burden in terms of requiring the employe to put in extra hours to keep up with his or her regular duties, no such showing has been made here.

> ments, change of duties, or termination, which could suggest that his position was undermined.

In *Pierce v. Texas Dept. Of Crim. Justice, Inst. Div.,* 37 F. 3d 1146, 1150 (5th Cir. 1994), the Court concluded that neither the investigations of an employe for drug trafficking and a verbal altercation, nor the requirement to undergo a polygraph examination[4] amounted to adverse employment actions: "Neither investigation resulted in any action being taken against Pierce . . . Pierce's polygraph examination . . . do[es] not amount to [an] adverse employment decision[] because no adverse result occurred."

Notwithstanding the foregoing, the Commission is not prepared to hold categorically that under no set of circumstances could investigative or prèdisciplinary activities amount to discriminatory action under the WFEA. Section 111.31(3), Stats., provides that "[t]his subchapter shall be liberally construed." Federal courts in their interpretation of Title VII[5] have recognized that the reach of Title VII "'is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Systems, Inc.,* 510 U. S. 17, 126 L. Ed. 2d 295, 301, 114 S. Ct. 367 (1993) (citations omitted). In *Collins v. State of Ill.,*830 F. 2d 692, 702 (7th Cir. 1987), a Title VII case involving an ostensibly lateral transfer, the Court observed:

> Title VII does not limit adverse job action to strictly monetary considerations. One does not have to be an employment expert to know that an employer can make an employe's job undesirable or even unbearable without money or benefits ever entering into the picture. In a sex discrimination case focusing on the issue of adverse job action, the Second Circuit pointed out:
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> > Recognizing that job discrimination may take many forms, Congress cast the prohibition of Title VII broadly to include subtle distinctions in the terms and conditions of employment as well as gross salary differentials based on forbidden classifications. . . .
>
> We believe adverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well. (citations omitted).

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[4] This case apparently did not involve a jurisdiction with a law regulating the employer's imposition of polygraph examinations. In Wisconsin, the provisions of §111.37, Stats., could create separate issues regarding the requirement of a polygraph examination.

[5] Federal decisions interpreting Title VII can provide guidance for the interpretation of the WFEA. *Bucyrus-Erie Co. v. ILHR Department,* 90 Wis. 2d 408, 421, ,280 N. W. 2d 142,n. 6 (1979).

This Commission has recognized that harassment not involving changes in the tangible aspects of an employe's specific employment status, that is motivated by the employe's protected status, can violate the WFEA. *See, e. g., Laber v. UW-M,* 81-PC-ER-143, 11/28/84:

> Section 111.322, Stats., provides in pertinent part that " . . . it is an act of employment discrimination to do any of the following: (1) . . . to discriminate against any individual in . . . terms, conditions or privileges of employment because of any basis enumerated in §111.321." One of the bases enumerated in §111.321, Stats., is creed and, therefore, respondent is prohibited from discriminating against complainant on the basis of religion in regard to his "conditions of employment." This prohibition . . . require[s] an employer to maintain a working environment free of religious harassment and to take positive action where necessary to redress or eliminate employment intimidation. Page 17 (citations omitted).

See also, Bratley v. DILHR, 83-0036-PC-ER, 7/21/83 (supervisor referring to employe in protected age category as "old," "old bastard," etc.); *Stark v. DILHR,* 90-0143-PC-ER, 9/9/84 (exclusion of handicapped employe from weekly staff meetings, etc.).

Thus there are two ways that an employer can take adverse employment action with respect to "terms, conditions or privileges of employment." The first type of action affects the tangible conditions of employment—i. e., employment status per se—such as a transfer to a less desirable position or the assignment of less desirable work. The second kind does not affect the employe's employment status per se but has an adverse effect on the employe's work environment—for example, a supervisor calling an employe stupid. However, precedent establishes that in order to be actionable, the actions must be sufficiently opprobrious to create a hostile environment. *See, e. g., Stark, id.,* ("hostile work environment"); *Martin v. DOC,* 94-0103-PC-ER, 12/22/94 ("a discrimination claim can be based upon an allegation of a discriminatorily hostile or abusive environment"). In the Commission's opinion, complainant has not established that the predisciplinary process followed by respondent created a hostile work environment.

Complainant testified that as a result of having received the notice of the predisciplinary hearing, he and his family suffered emotional distress, and he lost confidence in the trustworthiness of the division administrator. These things may have resulted from respondent's actions; however, these subjective reactions do not establish a hostile work environment on the basis of an objective standard. The Commission does not believe it can infer from the facts of record that a reasonable employe similarly situated to complainant would experience the handling of this one predisciplinary process as a

hostile work environment. While it is safe to assume that any allegation of employe misconduct will result in some degree of stress, we are dealing here with a single incident,[6] which did not result in the pursuit of any disciplinary action against complainant. It has been recognized in somewhat analogous contexts that isolated actions are unlikely to result in a finding of a hostile work environment. *See, e. g., Laber v. UW-M, id.*

If complainant had established the existence of a hostile work environment and the concomitant adverse employment action and prima facie case, respondent articulated a nondiscriminatory rationale for its action by its explanation that it felt it had to react to Ms. Berkner-Murphy's allegation because of its concerns about potential liability and the creation of a climate that would be conducive to sex harassment. The burden then would shift to complainant to try to establish that this rationale was a pretext for retaliation. Even assuming he had established a prima facie case, complainant did not establish pretext.

Complainant's attempt to show pretext rests mainly on the contention that respondent did not follow prescribed disciplinary procedures in his case. However, he did not sustain his burden of proof on this point. Complainant relies primarily on training materials issued by the Department of Employment Relations (DER) which call for an investigative hearing prior to the issuance of a notice of intended discipline and a predisciplinary hearing. However, these documents do not have the force of law, and there is nothing to contradict the testimony of respondent's management witnesses that respondent never adopted either these or any other formal disciplinary procedure. More significantly, there is no evidence to contradict the testimony of respondent's witnesses that the procedure followed in complainant's case was consistent with how other disciplinary cases were handled by the agency. In the Commission's opinion, it certainly would have been preferable from the standpoint of personnel management if respondent had followed the DER guidelines and proceeded with an investigative interview or meeting with complainant, rather than having denominated the first meeting as predisciplinary and having framed the letter providing notice of the meeting in such an accusatory tone. However, in the face of a record that establishes that complainant's case was handled no differently than other employes disciplined by respondent, this does little to advance complainant's case.

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[6] It may well be the case that complainant's reaction to the notice of the predisciplinary hearing was influenced by his pre-existing belief that management already had retaliated against him, which was the subject of his earlier complaint with the Commission (see Findings 3 and 4 above.) However, complainant did not pursue that case and it was dismissed. The dismissal of that case was essentially *res judicata* with respect to his earlier claim of discrimination, and it

Complainant also argues that the charge against him was more or less inherently incredible, since it was incredible that anyone would make such a remark at a gender communications training session, that no one could directly corroborate Ms. Berkner-Murphy's allegation, and that she would not have come forward with her allegation earlier. However, there was ample evidence that the trainer at the session was utilizing a confrontational approach and that there were a number of heated exchanges, in some of which complainant was involved. Also, Ms. Berkner-Murphy did mention the alleged remark to others on the day of the training session, as well as to Mr. Pawlisch at a meeting held several days later to discuss the results of the training session. It is clear that when Ms. Berkner-Murphy brought this up at the October 6, 1994, meeting that she did not intend to pursue a formal complaint. At the same time, management's explanation that it felt it should follow up on her allegation because of concerns about potential liability for sex harassment, and in the interest of working against the potential creation of a sexist atmosphere in the agency was not implausible. Although no one completely corroborated Ms. Berkner-Murphy's allegation, another employe (Ms. Hoppe) did state that she heard someone behind her say "bitch" and that complainant was seated directly behind her. These factors also do not lead to a conclusion of pretext.

In conclusion, it is unfortunate that this matter was not handled somewhat differently from a procedural standpoint. However, Ms. Berkner-Murphy appeared to be a credible person with a credible allegation, and management cannot be faulted for having decided to take a proactive approach to what she said. Furthermore, respondent made a showing, that was not refuted, that the disciplinary process that was followed did not contravene any agency policy, and was consistent with how other cases in the agency had been handled. In this context, complainant simply has not sustained his burden of establishing that management acted as it did because of a retaliatory motivation.

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would not be appropriate to attribute his belief in the earlier alleged retaliation to a "reasonable" employe.

ORDER

This complaint of discrimination is dismissed.

Dated: May 21, 1996

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