

JUDITH VOLOVSEK,
Complainant,

v.

**Secretary, DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION,**
Respondent.

**FINAL
DECISION
AND
ORDER**

Case No. 95-0072-PC-ER

This matter is before the Commission as a consequence of a complaint of discrimination filed on May 25, 1995. A hearing was held on the following issues:

Whether there is probable cause to believe that respondent either discriminated against complainant because of her sex or retaliated against complainant because of [her] participation in fair employment activities in the following terms and/or conditions of employment:

- a) Failed to reclassify complainant's position from Agrichemical Specialist - Developmental to Objective in May and June 1994 and 1995;
- b) Reviewed complainant's work performance negatively in 1994 and 1995, which caused complainant to file a memo about why her performance evaluations were being used as harassment;
- c) Evaluated complainant's performance by a different standard in May and June 1994 and 1995;
- d) Placed memos and letters in complainant's personnel files without providing complainant with copies in August and September 1993;
- e) Distributed work unequally in 1994 - 1995.
- f) Harassed complainant about her work performance in 1994 and 1995.

FINDINGS OF FACT

1. Complainant was hired by respondent DATCP on August 12, 1991, as a Plant Industry Inspector 1. Complainant was one of approximately 15 inspectors employed statewide. Complainant's responsibilities were, for the most part, limited to a particular area of the State.

2. During the relevant time periods, complainant's responsibilities included:

Enforcement of state and federal regulations related to the manufacture, packaging, labeling, distribution, handling, use and disposal of pesticides, through investigations and inspections.

Enforcement of state and federal regulations dealing with feed, fertilizer, soil and plant additives, lime and seed to prevent the sale or distribution of improperly manufactured, adulterated or mislabeled products.

Initiation of compliance actions in the field when investigation or inspection activities have disclosed violations of state or federal laws and regulations pertaining to feeds, pesticides, fertilizers, chemigation systems, bulk fertilizer and pesticide storage facilities, pesticide mixing/loading sites, soil and plant additives, groundwater, seed and lime.

Cooperation, consultation and education of other local, state and federal governmental agencies and the regulated and general public to increase public awareness of department programs.

3. Her position was reallocated to Agrichemical Specialist - Entry, effective June 14, 1992, as a consequence of a classification survey. At the time, complainant was still serving a probationary period.

4. Complainant's position was reclassified to Agrichemical Specialist - Developmental, effective July 11, 1993.

5. The Agrichemical Specialist classification series is a progression series.

6. During 1994 and 1995, the only person employed by respondent classified at the Agrichemical Specialist - Developmental class level was complainant.

7. Most of the other inspectors employed by respondent were promoted in 1993 to positions assigned to the classification series of Environmental Enforcement Specialist. Complainant was not selected for promotion.

8. Complainant filed a complaint of discrimination with the Personnel Commission in 1993 relating to various actions by respondent, including the failure to select the complainant for promotion to an Environmental Enforcement Specialist position. That complaint, Case No. 93-0098-PC-ER, has previously been decided by the Commission.

9. Reclassification from Agrichemical Specialist - Entry to Developmental requires, among other things, one original pesticide certification. Reclassification from Developmental to Objective includes a requirement that the incumbent have 2 such certifications. Certifications are valid for 5 years and there is no requirement the certifications be maintained in order to continue classification at a certain level. Supervision at the Developmental level is described as "limited," i.e. the middle of three levels of supervision. In contrast, inspectors working at the Objective level receive "general" supervision (the lowest level) and require greater knowledge and understanding of the applicable laws as well as a higher level of effectiveness in administering those laws.

10. The following persons were assigned (on either a permanent or acting basis) the responsibility to supervise the complainant during the periods indicated: Peter Helmbrecht, from August 1991 to September 1992; David Hagemeyer, from September 1992 to November 15, 1993; David Fredrickson from November 15, 1993 to May 31, 1994; and Luis Delgado commencing on May 31, 1994. At all relevant times, David Fredrickson served as the Section Chief of the Investigation and Compliance Section, Agrichemical Management Bureau, Agricultural Resources Management Division.

11. Complainant's performance evaluation covering the period from 1992 to 1993 identified several areas where she needed additional experience and training. The evaluation indicated complainant needed 1) a better understanding of the laws and rules that respondent administered, 2) continued training in the more complex inspections, 3) improvement in her knowledge of industry practices, 4) improvement in her verbal communication skills, and 5) improvement in her listening skills.

12. All of complainant's supervisors had the practice of maintaining a "supervisory file" for materials relating to the performance of their subordinates. The file was maintained separately from the individual personnel files kept for each employee. Instead of relating to just one person, the "supervisory file" included both favorable and unfavorable materials regarding any of the supervisor's subordinates. The "supervisory file" was reviewed by the supervisor to prepare for annual evaluations.

13. While he was complainant's supervisor, David Hagemeyer wrote a memo dated August 10, 1993, and placed it in the "supervisory file." The memo (Comp. Exh. 8) reads, in part:

On July 28, 1993 I called Bruce Johnson, building and grounds manager for the Wauwatosa School District, regarding [an] investigation and their practice of using prometon on school grounds in child play areas.

When I identified myself as Ms. Volovsek's supervisor, Mr. Johnson immediately began voicing his concerns about Ms. Volovsek's conduct during her investigation. He described her as being "very hyper and on the attack" and stated that "she was not making sense to us." Mr. Johnson stated that when he asked Ms. Volovsek for information regarding the laws on landscape applications, she stated that "she could not provide that information because it had not been printed yet." The investigation was conducted on May 18, 1993. The information brochures for the new lawn care rule had been printed and distributed to the investigators in January and February of 1993.

The memo did not constitute discipline, nor did it result in the imposition of discipline.

14. The next month, Mr. Hagemeyer placed another memo regarding complainant into the "supervisory file." (Comp. Exh. 9) This memo, dated September 16, 1993, referenced difficulties complainant was having in calculating the capacity of a bulk storage containment area. The memo did not constitute discipline, nor did it result in the imposition of discipline. Complainant wrote Mr. Hagemeyer a memo dated September 21, 1993, clarifying the reason she had needed to perform the calculations, rather than relying on previously calculated capacities. Handwritten notes, presumably by Mr. Hagemeyer, were placed on complainant's September 21st memo and the document was placed into the "supervisory file." The handwritten notes acknowledge that

complainant was correct, at least in part, to recalculate the containment area capacities, but note that she made certain errors when performing her calculations.

15. Upon discovering the existence of certain documents (Comp. Exh. 7 through 10) in the "supervisory file," complainant filed a grievance in an effort to have them removed. The documents in question were subsequently removed from that file. (Comp. Exh. 11)

16. The Employee Handbook (Resp. Exh. 1 and 3) provided to complainant when she was hired included the following description of the reclassification process.

A position may be *reclassified* to a different classification if a logical or gradual change occurs in the duties and responsibilities of the position, or if the classification is in a series where reclassification to the next higher level is based on the employe's satisfactory attainment of specified education or experience. Supervisors may request, through their division administrator, that the Department's Human Resources office review a position to see if a reclassification is warranted. In some situations, an employe may wish to initiate a request for review. This request must be made in writing to the employe's supervisor and should clearly indicate that the employe wishes to have their position reviewed for proper classification. If the supervisor does not give the employe a written response within 30 days, the employe may submit a copy of the original request to the Department's Human Resources office along with a statement requesting assistance in having the request reviewed. . . . If the Human Resources office concludes that a reclassification is not appropriate, the employe will be informed, in writing, of the reasons why the request is denied and the employe's appeal rights.

17. In order for the Human Resources office to consider a reclassification request, the request must be submitted in writing by the supervisor or the employe.

18. During the period from July of 1993 to July of 1995, neither the complainant nor her supervisor filed a written request for reclassification of complainant's position. Complainant did indicate to her supervisor on several occasions during this period that she wished to have her position reclassified to the Agrichemical Specialist - Objective level. Complainant's supervisor never supported such a reclass.

19. Duane Klein served as a specialist in respondent's bulk storage inspection program from 1991 to 1995. The program is designed to prevent contamination

from spills of both pesticides and fertilizer. Bulk storage facilities must be licensed. Inspections are required of the approximately 400 such facilities statewide and approximately 100 such inspections are performed annually. The inspections were performed by field staff, including complainant. Mr. Klein worked out of respondent's central office in Madison. Mr. Klein had occasion to accompany field staff on some bulk storage inspections and, over the course of several years, he accompanied nearly all of the inspectors. Mr. Klein went on a bulk storage inspection with complainant on August 8, 1993, and wrote a memo (Comp. Exh. 7) to complainant's supervisor, David Hagemeyer, regarding the experience. The three page memo identified specific problems with complainant's communication skills, organizational skills, listening skills, knowledge of the program and even driving habits. It includes the statement: "She didn't take my recommendations very readily and seemed to have an excuse for anything I would recommend." The inspection was handled so poorly that it was very embarrassing to Mr. Klein to be on site with complainant. Mr. Klein wrote the memo to make sure the complainant received assistance for improving her performance. He never found it appropriate to issue a memo regarding the performance of any of the other inspectors.

20. The memo from Mr. Klein was not placed in complainant's personnel file. The memo did not constitute discipline, nor did it result in the imposition of discipline. A copy of the memo was placed in the "supervisory file."

21. On October 13, 1993, complainant took a course from the Department of Employment Relations entitled "Basic and Technical Oral Communication Skills." Complainant summarized the course (Resp. Exh. 24) as follows:

The course was warm, relaxing, fun & friendly (by a psychology professor), but I feel it was quite elementary, after my own private readings which are quite advanced. Nevertheless, it was highly recommended for management.

21. Complainant's written performance evaluation for the period from July 1, 1993 to June 30, 1994, was presented to her and discussed on June 2, 1994, by David Fredrick. Mr. Delgado was also present but merely observed the evaluation be-

cause he had just begun working for respondent. The written evaluation (Comp. Exh. 4) read, in part:

Judy has done an adequate job performing investigations employing investigation techniques, researching issues and following established policies and procedures for successful prosecution of cases. Judy needs to make sure her investigations are as impartial as possible. Judy's area has had a number of repetitive investigations and Judy must make sure that she investigates reports of violations as openly as possible. We can not begin investigations with assumptions about an applicator's guilt or innocence. Judy needs to make sure all possible violations in an incident are identified and documented. Improving attention to detail is very important in progressing through the job series Judy is in. Judy's case write ups are good, but can be improved in organization. I expect Judy's write ups will improve as a result of the recent training we completed.

Judy applies a sufficient knowledge to the state and federal inspectional programs considering the use of inspection methods, techniques of application, application of computerized systems, constructional materials, and principals [sic] of plumbing following established policies and procedures. Judy does not currently have any chemigation systems in her area in need of inspection. This will change as we begin to conduct nursery and greenhouse inspections in relation to the new Federal worker protection standard. Judy's inspection numbers are good. Judy is progressing in knowledge and experience, and her quality of work should continue to improve as well.

Her detection of marketplace violations is adequate considering the attention to detail, devotion to take the necessary time needed, recognition of potential hazardous situations and knowledge of state and federal laws that generate registrations and enforcement actions. Judy did a very good job in an investigation related to the distribution of an illegally imported and used pesticide insecticidal chalk. Judy had 2 investigations referred to EPA for review, with one resulting in an administrative complaint being issued. The other could not be processed due to problems with sample documentation. Attention to detail and organization will come with more experience and Judy's work quality should improve as well.

Judy's work output is more than assigned expectations due to a good work ethic. Judy needs to consider priorities set by specialists and management in collecting samples. Samples should reflect the use patterns and consequences of improper formulation in collecting samples. On

several occasions during the year samples were collected of very low analysis specialty fertilizer products such as aquarium fertilizer, that are not of significant value or impact. The number of samples taken is higher than assigned, but the types of samples taken must be more carefully considered.

Judy's caliber of work is acceptable in most instances through accuracy, thoroughness, clarity of work, frequency of errors, re-work rates, attention to detail, following guidelines, laws and rules. Judy should continue to improve her knowledge and the organization of her work. Judy works very hard and always is willing to participate in training to improve her knowledge.

Judy has issued an above average number of warning notices, stop sales and holding orders, reflecting fairness, good judgement, good record keeping of past inspections and is following the "Uniform Enforcement Policy" guide in enforcement matters.

Judy's knowledge of the laws and the industries we regulate is improving. Judy needs to continue to progress in her knowledge and understanding. Judy needs to work with specialists and her supervisors to continue to learn. Judy needs to continue to use the materials and hand-outs she has been provided to work with the regulated public.

Judy is improving and is somewhat effective in fostering voluntary compliance by the regulated industry through the ability to understand new or existing programs, conveying the impact or importance of the program and confidently present the material as an active speaker. This should improve as her knowledge improves.

Judy conscientiously tries to fulfill responsibilities, effectively meets schedules, timeliness in emergencies, showing initiative and actively seeks new responsibilities. Judy works very hard and appears to like her work. Judy needs to listen to her fellow staff persons and to her supervisory personnel. Judy needs to work on her organization and needs to seek help in any areas she may be uncomfortable with. Improving her work quality in sampling decisions is a necessary next step in her performance.

It is my conclusion that your overall performance during the review is best described as At or Above Job Standards. Description:

The employee who performs the duties of their position as defined by the classification specifications and their position description. This employee performs at or above the minimum standards established for their position. This employee demonstrates a steady performance of good quality and generally requires only normal supervision.

Complainant wrote the following comment at the end of the evaluation:

I feel all of the above types of "needs improvement" "better organization" "judgement on sample taking" "continue to learn" is a ploy to keep me at the developmental level -- I feel I have been working at the objective level for at least a year, probably more.

23. During the course of the evaluation conference, Mr. Fredrickson referred to various specific situations that supported his conclusions and observations in the evaluation document. Mr. Fredrickson's conduct during complainant's evaluation was consistent with how he conducted evaluations of his other subordinates.

24. Near the end of the June 2, 1994, performance evaluation, complainant asked if she was going to be considered for reclassification. Mr. Fredrickson answered, "No." He reviewed the performance standards that would have to be met for reclass from Developmental to Objective and indicated she could make a written request to Human Resources for reclass review. Mr. Fredrickson was concerned that complainant 1) was not working at the level of supervision required for the Objective level, 2) did not have sufficient knowledge and understanding of the programs and laws and 3) was unable to effectively administer and enforce the laws. Complainant refused to sign the 1994 evaluation.

25. Mr. Delgado wrote a 3 page memo (Comp. Exh. 20) dated November 23, 1994, regarding a telephone conversation he had with complainant on November 22nd, and placed the memo in the "supervisory file." During the telephone conversation, he had asked to meet with complainant "regarding some facility/record inspection reports in which she notes numerous violations at 3 different sites but did not issue any warning notices." The telephone conversation continued with a discussion about the specific instances. The memo included the following language:

Hartung Bros. has been under Special Order (Dated April 22, 1988) to comply with various provisions of the Bulk Storage regulations under chs. ATCP 32 and 33. These provisions were to have been met by April 15, 1988.

On 10/11/94, Judy conducted a bulk storage inspection and found at least two violations of the Special Order. These violations were handwritten by her in red ink on a copy of the Special Order itself and on the facility inspection report. However, she did not issue any warning notices for these violations. . . . She again stated that her reasons were in the file and that I had better read it more closely. I ran through the file with her on the phone and could not find any of her "reasons." . . .

Before she ended she said that she was going to take up the harassment charge with her union and that she wanted me to put this conversation in her file. I told her this request would be taken care of.

The memo did not constitute discipline, nor did it result in the imposition of discipline.

26. Complainant's work assignments for 1995 are set forth, at least in part, in a document (Resp. Exh. 7) dated February 22, 1995. Complainant was directed to conduct approximately 15 seed inspection. The list included the name of the seed producer, as well as the producer's address and telephone number. Of the listed producers, there was one each in Montana, Illinois, Minnesota, Ohio and Pennsylvania and two in Michigan. The remainder on the list were producers with addresses in Wisconsin. The regular procedure for obtaining seed samples from out of state producers was to look for the seeds at stores/facilities within Wisconsin. Complainant incorrectly understood that she was to travel to the producer's home state to obtain the seed samples.

27. In a memo to complainant dated February 17, 1995, (Comp. Exh. 23) Mr. Delgado analyzed complainant's investigation of a complaint (Robinson/Davis) arising from an aerial crop-dusting with an insecticide (permithrin). He suggested complainant may have cross-contaminated the sole sample that tested positive for the chemical (and that was outside of the plane's intended path or target area) by failing to follow the standard procedure of sampling from the target area last. He also noted that complainant had failed to identify the specific locations from which the samples were

taken "since no triangulation was conducted." The memo did not constitute discipline, nor did it result in the imposition of discipline.

28. Complainant responded in the form of her own memo dated March 2, 1995. (Comp. Exh. 24) In it, she stated, in part:

I will make sure I do the numbering [of samples taken for chemical analysis] in order in the future, so there can be no assuming I reentered the target area twice, or left the target area and went to sample another area. In this case I did not, but when I numbered the bags of samples at my truck after I was done sampling, I did not number them in the order they were taken.

29. It is improper procedure not to number samples immediately as they are taken. Complainant's action of taking the samples to her truck before numbering them was improper. The Robinson/Davis case would never have been prosecuted because of the various problems with complainant's investigation.

30. Complainant's written performance evaluation for the period from July 1, 1994, to June 30, 1995, was presented to her and discussed on May 10, 1995, by Luis Delgado. The evaluation (Comp. Exh. 4) reads, in part:

She has done an adequate job performing investigations, employing investigative techniques, researching issues, and following established policies and procedures for successful prosecution of cases. Judy must remain neutral and objective while speaking with complainants and suspected violators, throughout the entire investigation and in her case narratives. She readily identifies with the complainants' version of events and, thus, it is difficult for others to explain their versions and have them accepted. She has improved her attention to detail but should present these materials in an accurate, organized and focused manner.

She applies adequate knowledge to the state and federal inspectional programs considering the use of inspection methods, techniques of application, application of computerized systems, construction materials and principals [sic] of plumbing following established policies and procedures. Judy did not have any chemigation systems in her area last year, but with the new Worker Protection Standards this has changed for 1995. Judy conducted more mix/load inspections last year than she was projected to do. However, she continued to have errors in her calculations for active ingredients used at the mix/load sites. It appears that she may have corrected her errors in calculations for this review period. Judy

also has had inconsistencies in issuing warning notices and documenting violations during bulk storage inspections. She also may not fully understand the scope of the WPS program and what industries it applies to.

Her detection of marketplace violations is adequate considering the attention to detail, devotion to take the necessary time needed, recognition of potential hazardous situations and knowledge of state and federal laws that generate registrations and enforcement actions. Judy has improved somewhat in her attention to detail and organization of materials dealing with these inspections and violations.

Her work output is more than assigned expectations due to a good work ethic, but sampling priorities were inconsistent. With this year's new work plan, her priorities are set by program specialists, with her input, so these priorities should improve in consistency. She continues to have a lot of energy in performing these inspections.

Her caliber of work is acceptable in most instances through accuracy, thoroughness, clarity of work, frequency of errors, re-work rates, attention to detail, and following guidelines, laws and rules. Judy has improved the organization of her work and this has led to increased efficiency. She should continue to improve somewhat on her organization and preplanning.

She has issued somewhat more than an average number of warning notices, stop sales and holding orders, which may reflect fairness, good judgement, good record keeping of past inspections and is following the "Uniform Enforcement Policy" guide in enforcement matters. Again, she must remain neutral and objective until all the facts are in before issuing some warning notices and must follow the Uniform Enforcement Policy guide more strictly in issuing others.

Her knowledge of the laws, programs and regulated industry is improving. She seeks to improve her knowledge and understanding of these and other programs. Judy works with specialists in an effort to continue to learn but does not readily accept assistance from her supervisors or management in this effort to continually evolve and improve.

She is somewhat effective in fostering voluntary compliance by the regulated industry and should improve her communication skills through increased organization and clarity of thought and presentation. Judy conveys the impact and importance of the programs to her audience and

their understanding of how they are to comply will increase as her understanding and focus increases. . . .

It is my conclusion that your overall performance during the review period is best described as At or Above Job Standards.

31. The May, 19, 1999, evaluation session lasted approximately 3 hours. Mr. Delgado went through the document line by line and gave concrete examples to support the comments found in the evaluation. Mr. Delgado's conduct during complainant's evaluation was consistent with how he conducted evaluation of his other subordinates. Complainant refused to accept Mr. Delgado's explanations for the evaluation and was antagonistic.

32. If she had job-related questions, complainant always checked with John Peters or another field inspector rather than contacting her supervisor. Management sought to limit this practice and management told at least one other inspector not to spend a lot of time helping complainant, that it was the responsibility of the supervisor. In a memo dated May 8, 1995, (Comp. Exh. 11) Mr. Neher informed complainant:

I have discussed your concerns with Ned, Luis [Delgado] and Dave Fredrickson. We all agree that open communication is essential to maintaining a positive work environment and achieving top productivity.

There needs to be a clear understanding on your part that the intent of your supervisors is to offer constructive suggestions and ideas on how to do your job better. This includes both technical and general comments and discussion on assignments from Dave, Luis and Pete [Helmbrecht]. It is imperative that you and the supervisory team have a mutual understanding on objectives and results. I expect you to confer primarily with them on issues, assignments and general questions rather than going directly to various field staff.

Respondent's efforts in this regard were necessitated by complainant's regular practice.

33. During the relevant time period, complainant was not disciplined, nor was she placed on a concentrated PPD.

CONCLUSIONS OF LAW

1. Complainant has the burden of establishing probable cause to believe that discrimination or retaliation occurred.
2. Complainant has failed to sustain her burden.

OPINION

In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. §PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

Under the Wisconsin Fair Employment Act (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. Complainant, a female, has alleged that a variety of adverse terms and conditions in her employment were based on her sex. As discussed below, the circumstances do not give rise to an inference of discrimination.

To establish a prima facie case of Fair Employment Act retaliation, there must be evidence 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and

3) there is a causal connection between the first two elements. The complainant engaged in a protected activity when she filed her first complaint with the Personnel Commission in 1993. For purposes of this analysis, the Commission will assume that all of the complainant's supervisors and upper level management were aware of the complaint. However, as noted below, the complainant has failed to establish a causal connection between her protected activity and the adverse employment actions.

I. Generally

The testimony of respondent's witnesses was consistent in terms of complainant's level of work performance over an extended period of time. That performance was not such that she was disciplined, but her work also did not reflect a level of independence and knowledge such that her supervisors supported reclassification. In contrast, complainant had little evidence, other than her own testimony about her work performance, that lent support to her claims of discrimination. Some of complainant's testimony tended to contradict her claims. In addition, complainant's testimony was not very credible. The overwhelming weight of the evidence is that complainant's work performance during the relevant time period was marginal and that her superiors made their personnel decisions based on factors other than complainant's sex and her previously filed complaint of discrimination.

Complainant's own testimony suggests that reasons other than her sex and her previous complaint of discrimination served as the basis for respondent's actions. At hearing, complainant was asked about the comments she wrote at the end of the 1994 performance evaluation session:

Q And why did you write that?

A Well, at the immediate time I was allowed to write something, it occurred to me and I still feel that way that the kind of subtle language here, "needs improvement," "better organization," "judgement on sample taking," "continue to learn," it's a ploy to keep me at a lower pay scale, because I had asked several times, even before that, for a raise and I was shrugged off, or laughed off, and it was becoming pretty clear to me that management was very negative towards me as a person, and, for reasons of financial, department financial reasons.

This testimony indicates complainant felt, and still feels, respondent refused to reclassify her in order to save money, rather than for reasons of illegal discrimination or retaliation.

Two inspectors, David Hyer and Kevin Brey, called as complainant's own witnesses, testified on direct examination they did not observe different treatment of complainant by management.

Bob McGregor, another inspector, did testify that he overheard Ed Bergman state, during a conversation with Mr. Delgado and Mr. Helmbrecht, that, "If you need to get rid of someone, you need excellent documentation." When asked why he felt Mr. Bergman was discussing the complainant, Mr. McGregor testified: "At that point, who else would they be talking about?" However, Mr. McGregor acknowledged he did not know what Mr. Bergman's role was as to complainant. On cross examination, Mr. McGregor described the conversation between Msrs. Delgado, Helmbrecht and Bergman as follows:

It was going back to work assignments and if a person does not complete the assignment that there has to be a documentation of why. And then there was some discussion back and forth and Mr. Bergman stated that if you need to be going to put together documentation to do discipline type work, ah discipline type activities, you had to have it documented. And I guess that just surprised me.

Mr. Bergman's work title is not of record, but there is no indication that he served in a supervisory role relative to complainant. Even if complainant had been able to establish that Mr. Bergman was a member of management, the comment attributed to him by Mr. McGregor¹ merely indicates that any discipline requires documentation. The

¹ Mr. McGregor also testified that complainant was serving as a facilitator at a conference for inspectors when it was "summarily shut down." However, he didn't recall who terminated the session, nor could he give any specifics as to how it occurred. Mr. Delgado testified he was unaware of any training session in which complainant served as a facilitator. Mr. McGregor's credibility was undermined by his own ongoing dispute with respondent. Mr. McGregor also suggested that management's actions were a response to complainant's highly opinionated personality, rather than her sex. Testifying as a witness for complainant, he observed there was

comment is not specifically tied to complainant and complainant was not disciplined by respondent.

The record reflects complainant was working well below an exemplary level.

Complainant obviously did not understand the concept or practice of triangulation, even though it was supposed to be used to identify various sampling points. She testified she never received training on triangulation and had no instruments to perform it. She stated that someone would have to have surveying equipment in order to do triangulation. Later, after acknowledging she had never asked respondent for any training, complainant said she believed she needed training on triangulation. A subsequent witness, Mike Brown, who was also employed by respondent as an inspector, was able to clearly explain how to triangulate a point. He testified that inspectors never had to use surveying equipment for triangulation.

Complainant also testified she was directed to *visit* the states of Washington and Montana to obtain seed samples from seed producers in those states. She understood this assignment to arise solely from a document (Resp. Exh. 7) dated February 22, 1995, which is a lists approximately 15 seed inspections she is to conduct. The list includes the name of the seed producer, as well as the producer's address and telephone number. Of the listed producers, there was one each in Montana, Illinois, Minnesota, Ohio and Pennsylvania and two in Michigan. The remainder were producers with addresses in Wisconsin. There is nothing on the document to indicate the seed inspections had to be carried out at the production facility. Testimony from another inspector clearly established that samples from out of state seed producers were to be obtained from sales locations within Wisconsin.

The memo about complainant's bulk storage inspection on August 8, 1993, was the only memo Mr. Klein ever wrote as a consequence of accompanying an inspector on a bulk storage inspection. He wrote it because he saw many areas where complainant needed to improve and he wanted to make sure the supervisor knew this so he could

another female inspector whose personality was accepted by both management and the field staff and who had been hired about the same time as complainant.

get training for her. Mr. Klein testified that the inspection was handled so poorly that it was very embarrassing to him to be on site with complainant.

Complainant's high impression of herself and clear disdain for her supervisors are both reflected in her description of a course she took on the topic of communication skills. (Finding of Fact 21) Complainant noted the course was "quite elementary" given her own level of "advanced" study, but she would "highly recommend" that management enroll in the course.

In addition to this general discussion of the absence of evidence supporting complainant's claims of sex discrimination and retaliation for having filed her 1993 complaint, the Commission offers the following comments regarding complainant's specific allegations.

II. Failure to reclassify

Analysis of the reclassification issue is made more difficult by the fact that the classification specifications for the Agrichemical Specialist series (including the Developmental and Objective levels) are not part of the record. However, based on her testimony at hearing, complainant does not understand the concept of reclassification of civil service positions:

Q Did your title ever change from Plant Industry Inspector?

A It changed toward the end of my probationary period when the entire group of field inspectors, of which I was one, decided to, for reasons I didn't understand at the time, to be *reclassified* to Agrichemical, either Investigators or Specialists.²

Contrary to complainant's testimony, her position was *reallocated* from Plant Industry Inspector 1 to Agrichemical Specialist - Entry rather than reclassified to that level. The distinction between reclassification and reallocation is described in the employe handbook. (Resp. Exh. 1, Finding of Fact 16) The evidence also indicated that complainant did not understand the procedures for initiating a reclassification request, even though she had received that information in her handbook.

Complainant acknowledged she only knew of one requirement for reclassification from the Agrichemical Specialist - Developmental to Objective level; to have two pesticide certifications. The fact that complainant was unaware of any requirements beyond two certifications does not mean there were no additional requirements. David Fredrickson testified that the certifications were not a reason for not reclassifying the complainant. Even though the class specifications for the Developmental and Objective levels are not in evidence, testimony of respondent's witnesses established that, at a minimum, these classifications are distinguished based on the level of supervision and knowledge of laws and requirements, as well as on the number of pesticide certifications. Complainant's supervisors did not consider her to be performing at the higher level and did not support reclassification of her position. The complainant simply did not take the requisite steps to initiate a formal reclassification request without the support of her supervisors. Because complainant did not take the steps for reclassification, her request never reached the respondent's Human Resources office for review.

Complainant contends that it was unnecessary for her to make a written reclassification request. In support, she points to a letter dated March 20, 1997, (the last 2 pages of Resp. Exh. 18) from Peter Helmbrecht, as the Environmental Enforcement Supervisor denying complainant's February 7th oral request for reclassification to the Agrichemical Specialist - Objective level. This letter merely shows that on one occasion, complainant's supervisor chose to respond to complainant's oral reclass request in writing. It does not establish that Mr. Helmbrecht had the authority to reclassify complainant's position. In fact, the final paragraph states: "If you disagree with this decision you may file a written request for review of the decision with the Bureau of Human Resources." By memo of April 1, 1997 to Human Resources, complainant formally requested a review of Mr. Helmbrecht's decision. Complainant failed to file a similar written reclassification request with Human Resources during the two years (1994 and 1995) that fall within the issue for hearing in the present case. There is no probable cause as to this allegation.

² This testimony is from the first few minutes of direct examination of the complainant.

III. Negative reviews of work performance in 1994 and 1995 and a different standard of evaluating performance in 1994 and 1995

Mr. Fredrickson testified he had reviewed complainant's performance evaluations from before 1994 and they were fairly similar to the 1994 evaluation. The record also contains a reference in Resp. Exh. 6, to an earlier performance evaluation. That document provides that complainant's 1992/93 evaluation "identified several areas where you needed additional experience and training. The first need is a better understanding of the laws and rules that we administer. . . .Your performance evaluation notes that you should continue to work with office staff for training in the more complex inspections. Your recent performance evaluation identifies that improvement is needed in your knowledge of industry practices. . . . Other significant areas of concern noted in your performance evaluation are your verbal communication skills and particularly your listening skills."

Mr. Fredrickson and Mr. Delgado offered specifics to support the observations they made in the 1994 and 1995 evaluations. David Hyer, an EES Senior, testified that he also had received criticism of his work product in his evaluations, but that he still received the same "at or above" rating as complainant. This testimony reflects consistent treatment of the various inspectors. The evidence establishes that the negative comments in complainant 1994 and 1995 evaluations reflected actual difficulties with complainant's work performance difficulties, rather than reflecting either complainant's sex or her prior discrimination complaint. There is no evidence tending to show that respondent applied a different standard when evaluating complainant's performance during 1994 and 1995. There is no probable cause as to these claims.

IV. Documents placed in file in August and September 1993

The Commission finds that the documents in question were not kept in the complainant's personnel file. Instead, there were kept in a "supervisory" file that included

materials relating to the group of individuals who were subordinate to the supervisor. While these documents were later provided to complainant by management, but there is no indication that complainant was treated differently in terms of the presence of such documents in the "supervisory file." There is no probable cause as to this allegation.

V. Distribution of work

Complainant was one of three inspectors who filed a group grievance regarding work assignments. All three grievants, complainant, Mr. Saatkamp and Mr. McGregor, were classified in the AgChem Specialist series. All of the other inspectors had been promoted out of that series and into Environmental Enforcement Specialist positions. Testimony established there was a clear distinction between the classifications in terms of performing certain duties. As one consequence, the three remaining AgChem Specialists were assigned the bulk of the fertilizer sampling responsibilities. Complainant's fertilizer sampling assignments were extended outside of her primary territory. The distinctions in work assignments between the inspectors were not based on sex or having engaged in protected activities under the Fair Employment Act. There is no probable cause as to this allegation.

VI. Harassed complainant about her work performance in 1994 and 1995

As Assistant Administrator of respondent's Agricultural Resources Management Division and supervisor of Mr. Fredrickson, Esther Chatman attended various meetings with complainant and observed both Mr. Fredrickson and Mr. Delgado. Ms. Chatman testified that neither supervisor acted inappropriately and that they tried very hard to explain things to complainant.

In her initial post-hearing brief, complainant argued that her phone conversations with her supervisor "would often include her supervisors dealing with her in a hostile manner, including yelling at her and saying things she felt were inappropriate such as "so you can be bought." Complainant acknowledged secretly tape recording more than 30 phone conversations with Mr. Delgado, yet she did not offer that evi-

dence at hearing, nor did she provide other evidence tending to support a probable cause finding as to the allegation of "harassment."

Complainant contends she was harassed when she was directed to turn in her laptop computer. The record showed that the field inspectors initially had laptops assigned to them, but when they moved from their homes to field offices, they received desktop PCs. The laptops did not have enough memory to run the software used on the desktops. Several inspectors asked to be allowed to keep their laptops, but those requests were denied and the inspectors were required to turn over their laptops when they moved into the rental offices so they could be redistributed to other divisions in DATCP. When Mr. Delgado contacted complainant and advised her to turn in her laptop, complainant said she would only do so if it was a direct order. Complainant then asked to talk with Mr. Fredrickson about the matter and she subsequently wrote him a memo dated December 8, 1994:

I have been requested to return my laptop computer to the office.

I use the laptop out in the field continuously. . . .

I would be seriously hampered in my work and it will effect the time in which assignments and complaints are finished by at least 50%. (Comp. Exh. 21)

Respondent permitted complainant to continue using the laptop even though she had been issued the desktop. The complainant was the only inspector allowed to do so. This sequence undermines, rather than supports, complainant's allegation of harassment based on sex and retaliation.

Complainant also suggests she was harassed when she was directed to seek guidance from her supervisors, rather than addressing her questions to the other inspectors. It is undisputed that management wanted the complainant to communicate her "how to" questions to her supervisors rather than to the inspectors in adjacent territories. (Finding of Fact 32) It is also undisputed that complainant's practice was to check with John Peters or another field inspector if she had any questions. Respondent's memo and its efforts to increase communication between complainant and her

supervisors was due to her efforts to avoid asking her supervisor rather than due to either her sex or her prior complaint.

Complainant appears to argue that because she was never put on a concentrated PPD and not formally disciplined, any negative comments about her work could not have been justified. This is not a logical premise, however. Supervisors have to be able to offer criticisms, suggestions/directions to employes without going through the formal PPD or disciplinary process. Respondent made every effort to work with the complainant rather than to discipline her.

There is no probable cause as to complainant's harassment allegation.

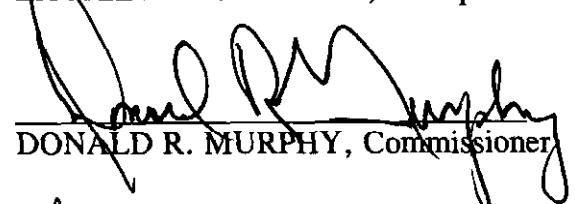
ORDER

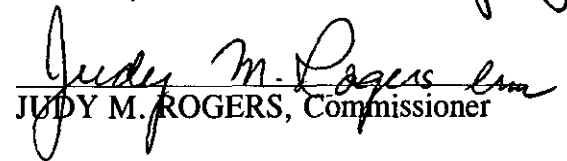
This complaint is dismissed.

Dated: August 27, 1999 STATE PERSONNEL COMMISSION


HARRIE R. McCALLUM, Chairperson

KMS:950072Cdec1


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:
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845 North 11th Street
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Ben Brancel
Secretary, DATCP
P.O. Box 8911
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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