STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA REINHOLD,
Complainant,

v.

OFFICE OF THE COLUMBIA COUNTY DISTRICT ATTORNEY and MARK BENNETT,
Respondents.

Case No. 95-0086-PC-ER

RULING ON RESPONDENTS' MOTIONS TO DISMISS and RULING ON COMPLAINANT'S REQUESTS TO AMEND THE COMPLAINT

This case is before the Commission for resolution of respondents' motion to dismiss or, in the alternative, for summary judgment. The parties filed written arguments, with the final brief due by July 28, 1997. Complainant has been represented by counsel throughout these proceedings.

FINDINGS OF FACT

1. Complainant filed a charge of discrimination on June 23, 1995, alleging unequal treatment based on sex, as well as sex harassment in violation of the Fair Employment Act (FEA), §111.31, et seq., Stats. She also alleged retaliation in violation of the whistleblower law, §230.80, et seq., Stats., and in violation of the FEA. She filed a perfected complaint on July 6, 1995, with the only change being that her own signature was notarized on the form.

2. The Commission issued a ruling dated November 14, 1995 (hereafter, First Ruling) which dismissed DOA as a party, which added Mr. Bennett as a party with respect to the whistleblower claim only and which dismissed the complaint under the worker's compensation (WC) exclusivity doctrine. Complainant filed a petition for rehearing regarding the First Ruling. On January 3, 1996, the Commission issued a Second Ruling which granted complainant's petition for rehearing on the basis of a material error of law and which reversed the First Ruling's dismissal of the case finding that the WC exclusivity doctrine presented no bar to pursuing her claims.

3. An Initial Determination was issued on January 31, 1997, which found no probable cause to believe that the alleged discrimination occurred. Complainant appealed. A prehearing conference was held on April 16, 1997, at which time a briefing schedule was established for respondents' present motion.

4. The first portion of respondents' motion is for dismissal of all claims occurring more than 300 days after the complaint was filed. The 300 day period prior to the initial filing on June 23, 1995, commenced on August 28, 1994, and ended with the filing date. The 300 day period prior to filing of the perfected complaint on July 6, 1995, commenced on September 10, 1994, and ended with the filing date.

5. Paragraph 5 of the complaint contained the allegations of sex discrimination based upon unequal treatment, as shown below:

> Throughout complainant Reinhold's employment as assistant district attorney, upon information and belief, respondent Bennett treated complainant Reinhold and the other female employees in the office unfavorably in comparison with male Columbia County employees by engaging in highly inappropriate, injurious, and offensive conduct, including but not limited to the following:
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> a) deferring to Columbia County police officers' judgment on prosecutorial decisions over complainant Reinhold's and her fellow female assistant district attorney's, Rose Yanke, legal judgment.[1]
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> b) soliciting police officers' comments on complainant Reinhold's and Ms. Yanke's work performance while refusing to allow complainant Reinhold and Ms. Yanke to respond to said comments, because in the respondent's estimate, it was a waste of time to consider the female viewpoint when respondent had heard the male officer's side of the story.
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> c) refusing to address the hostile and discriminatory conduct of certain Columbia County Sheriff's Department deputies toward complainant Reinhold and Ms. Yanke.
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> d) requiring complainant Reinhold and Ms. Yanke to abide by a specific set of office rules regarding work hours and "overtime" while allowing a male attorney in the office to set his own hours without reprimand.

6. Paragraph 7 of the complaint[2] contained the allegation of sex harassment, as shown below:

> In addition to treating male employees by a different standard than women employees, upon information and belief, respondent Bennett by his actions created an intimidating, and hostile environment by engaging

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1 This allegation is stated as clarified in ¶6 of the complaint.

2 The complaint contains a ¶7 on page 4, and a second ¶7 on page 5, which appears to be a typographic error. The Commission's reference here is to ¶7 on page 4 of the complaint.¶

in offensive, inappropriate conduct, including but not limited to the following:

a) questioning complainant's ability to do her job because of her gender.

b) subjecting complainant to sexually inappropriate and offensive statements including:

i) in reference to an instance in which complainant objected to Mr. Bennett's implication that complainant had sexual relations with some of the police officers, Mr. Bennett threatened complainant saying if she ever "crossed" him, he would have "her tits in a wringer." (Emphasis added.)

ii) in reference to an instance in which complainant asked for the day off because she had worked the entire previous evening, Mr. Bennett refused the request saying if complainant "had the balls" she would be able to handle staying awake all night and working the following day. (Emphasis added.)

c) degrading and humiliating complainant by chastising her work performance in the presence of other employees.

d) requiring complainant to perform clerical duties at the expense of her legal work, and forcing complainant to represent herself as a secretary to the court and other members of the Wisconsin bar.

7. The only act complained of in the initial and perfected complaint as retaliation in violation of the FEA is shown below:

a) Mr. Bennett threatening to fire complainant in retaliation for her opposition to respondent's conduct.[3]

8. The 60 day period prior to filing the perfected complaint on June 23, 1995, commenced on April 25, 1995. The 60 day period prior to filing the perfected complaint on July 6, 1995, commenced on May 8, 1995.

9. Neither the initial nor the perfected complaint provided dates for the alleged acts of discrimination/retaliation as is evident from ¶¶ 5-7 & 9 above, which was a matter raised by respondents in the investigation of this complaint. *See*, Godar/Bennett letter dated August 16, 1995, pp. 1, 3-4. Complainant replied by letter dated August 22, 1995, stating (on pp. 3-4) as follows (emphasis added):

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[3] This allegation was included in par. 7 of the initial filing (p. 5) as an act of sex harassment, but is the only retaliatory act alleged in the entire complaint.

> Respondent (Bennett) argues that complainant has failed to meet the statute of limitations requirement that discrimination claims filed under the FEA be brought within 300 days of an alleged discriminatory act. Respondent is correct in noting that complainant did not state the dates on which these alleged discriminatory acts took place. At this time, complainant asserts that Mr. Bennett's discriminatory behavior has been ongoing since January, 1989 through the date on which complainant Reinhold filed her complaint with the Personnel Commission in June, 1995. As such, the conduct of respondent constitutes a continuing violation in satisfaction of the statute of limitations requirement. 'However, in fulfillment of respondent's request for specific dates, complainant hereby alleges that in November, 1994, Mr. Bennett discriminated against her on the basis of sex including but not limited to the following ways: requiring complainant Reinhold to perform clerical duties at the expense of her legal duties based on the fact that she is a woman and in retaliation for her rejection of his sexual innuendo, and by commenting to complainant that he should never have hired a woman assistant district attorney "to do a man's job."

10. The initial and perfected complainant contained no specific actions claimed as whistleblower retaliation. Another component of respondents' present motion is the contention that the whistleblower claim must be dismissed as untimely filed. Complainant conceded the untimely nature of this filing in arguments received by the Commission on July 16, 1997 (p. 9).

OPINION

Whistleblower Allegations Dismissed with Resulting Change in Case Caption

Complainant now has conceded that her claim of whistleblower retaliation was filed untimely. (See p. 9 of complainant's arguments filed on July 16, 1997). Accordingly, her allegation of whistleblower retaliation is dismissed. Since Mr. Bennett was a party only as to this claim, he is dismissed as a party. The caption of this case for future use will be: *Barbara Reinhold v. Office of the Columbia County District Attorney*, Case No. 95-0086-PC-ER.

Motion for Summary Judgment - Allegations of Disparate Treatment

Summary judgment only should be granted in clear cases. See *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (citations omitted):

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact. A

> summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

The allegations of disparate treatment based on sex are recited in ¶5 of the complaint and are repeated herein in ¶5 of the Findings of Fact. A problem arises with the fourth allegation (different work rules applied to complainant than to a male district attorney) because the factual underpinning of the allegation has been conceded as untrue. Specifically, respondents pointed out in written arguments that:

> [I]t is uncontested that no male attorneys have been employed by the Columbia County District Attorney's Office for a number of years, and especially not within 300 days since (sic) Ms. Reinhold filed her complaint. While a male special prosecutor was appointed by the Court to serve in the District Attorney's office because of staffing needs, he did not begin working until **after Ms. Reinhold filed her complaint.**" (Page 2, respondents' arguments dated 6/16/97 with emphasis shown as it appears in the original document.)

Complainant's response to this argument confirmed respondent's statement. (Pages 7-8, arguments filed on 6/16/97.) Based on the foregoing, respondent's motion for summary judgment regarding the fourth claim of unequal treatment is granted.

Two remaining claims of unequal treatment (the first and second) are based upon Mr. Bennett's alleged deference to opinions of police officers (presumably, male police officers). As indicated in the Initial Determination (p. 5) complainant cannot successfully contend that Mr. Bennett treated her differently than male district attorneys (similarly-situated males) in regard to these allegations because there were no male district attorneys until after she filed her complaint. The same is true for the remaining allegation that Mr. Bennett failed to address "hostile and discriminatory conduct" of some sheriff deputies. Complainant cannot successfully establish that Mr. Bennett intervened under similar circumstances on the behalf of male district attorneys, because no male district attorneys were employed prior to the filing of her complaint.

Complainant attempts to avoid dismissal of the claims discussed in the prior paragraph by arguing, in essence, that the alleged conduct should be considered as part of the claim of sex harassment. This argument was raised for the first time in arguments filed on July 16, 1997 (pp. 7-8), as noted below in pertinent part:

> . . . Respondents also make allusions that the entire complaint against Respondents is defective for not comparing the mistreatment of Complainant to the treatment of males in similar positions. Respondents' brief states:
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> > . . . Ms. Reinhold never alleged in her original Complaint nor her most recent response (nor could she), that the duties she performed were different when compared to the duties of male employees in a similar position, and therefore has not stated a prima facie case of discrimination.
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> Respondents' Brief, p. 5. The Respondents argue here that Complainant necessarily must juxtapose Bennett's conduct towards her with his conduct towards male employees in the same workplace in order for her claim to be valid. However, this is contrary to the statute. Section 111.36, Stats., states that discrimination on the basis of sex includes [engaging in harassment]. Discrimination on the basis of sex is not limited to discrepancies in the treatment of females as compared to males in the same workplace. Section 111.36 is clear to state that discrimination on the basis of sex arises upon a showing of unreasonable harassment "directed at an individual because of the individual's gender." In this regard, Respondents' assertions that Complainant's allegations do not state a cause of action based on sex discrimination are also unfounded.

The problem with complainant's above-noted argument is that she alleged acts of sexual harassment as a separate claim from the acts of alleged unequal treatment. Accordingly, the Commission treats complainant's present argument as a request to amend her complaint to convert three claims of unequal treatment (items "a", "b" and "c", recited in ¶ 5 of the complaint) to claims of sex harassment under ¶7 of the complaint.

The Commission's administrative rule governing amendments is found in §PC 2.02(3), Wis. Adm. Code, shown below.

> PC 2.02 Complaints. . . . (3) Amendment. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

Interpretive guidance on when it is appropriate for the Commission to grant amendment, has been provided in prior cases. A summary of some case rulings was

included in *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94 (at pp. 9-10), as shown below.

> A complaint places the respondent on notice of two basic elements, to wit: the act complained of (such as failure to hire) and the discriminatory bases alleged (such as race and age). The Commission generally has allowed amendments to add an alleged basis of discrimination, but not to add acts complained of which bear no relation to the act complained of in the original complaint. Compare, for example, *Jones v. DNR*, 78-PC-ER-12, 11/8/79 and *Adams v. DNR & DER*, where amendment was permitted to add additional basis of discrimination; to *Pugh v. DNR*, 80-PC-ER-22, 1/8/82, where amendment was not permitted to add discrete, separate personnel transactions whether such newly-alleged acts pre-or post-dated the act complained of in the original complaint.
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> The distinction made in the Commission cases noted above represents a balancing of interests between the parties. . . . The burden for both parties is much greater where the amendment attempts to add an act which does not relate to the act complained of in the initial complaint. This is true because the opportunities to identify witnesses and preserve evidence is jeopardized.
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> Even where an amendment would be favored under principles mentioned above, the Commission has rejected amendment where . . . requested . . . after the Initial Determination was issued . . .

The request under consideration is to change three allegations of unequal treatment based on sex (as listed in ¶5 of the complaint) to include them in the claim of sex harassment (raised in ¶7 of the complaint on p. 4). This request was not made until July 16, 1997, which is more than two years after the complaint was filed and about 6 months after the ID was issued. However, the Commission believes the request is properly characterized as curing a technical defect, within the meaning of PC 2.02(3), Wis. Adm. Code and, accordingly, grants the request. The allowed amendment does not jeopardize respondent's opportunity to identify witnesses and preserve evidence because the original pleadings provided respondent notice of the acts complained of as well as complainant's perception that they occurred because of her sex.

Additional Amendment Requests

The Commission first notes that while the claim of unequal treatment in ¶5 of the complaint indicated the events occurred "throughout" complainant's employment, there was no indication of frequency in regard to the sex harassment claim.

Complainant's letter dated August 22, 1995, is shown in pertinent part in ¶9 of the Findings of Fact. The information in the letter is treated for purposes of the present ruling as a request to amend the complaint to allege that the harassing behaviors occurred on an ongoing basis since January 1989, as well as a request to amend the complaint to include an allegation that sex harassment occurred during the actionable period in that in November 1994, Mr. Bennett told complainant he should never have hired a woman assistant district attorney "to do a man's job" and he required complainant to perform clerical work.

These amendment requests are granted. They were raised about 6 weeks after the initial complaint was filed. The allegation of ongoing conduct is akin to adding a basis of discrimination (continuing violation) which is acceptable as an amendment when raised (as it was here) prior to issuance of the ID. The allegation that Mr. Bennett stated during the actionable period (in November 1994) that he should never have hired a woman as an assistant district attorney provides clarification of the allegations made in ¶7 of the complaint. This especially is true because complainant noted in ¶7 of the complaint the not all acts of harassment were specified therein.

Respondent contends the allegations of ongoing conduct and the two actions alleged to have been made by Mr. Bennett in November 1994, are defective as amendments because complainant has not sworn or attested to them "in a Complaint or Amended Complaint." The Commission agrees that a technical defect exists in this regard but concludes it is appropriate to provide complainant with an opportunity to cure the defect. Accordingly, complainant has a period of 21 calendar days from the date this ruling was mailed (as recited in the Affidavit of Mailing sent with each party's copy of this ruling), to submit these three allegations in a statement that has been signed, verified and notarized, as required under §PC 2.02(2), Wis. Adm. Code. If she does not submit the required statement by the due date, the Commission will dismiss the allegations.

Motion to Dismiss Based on Timeliness Concerns

It is complainant's burden of proof to demonstrate that the allegations raised in her complaint were timely filed. See *Vander Zanden v. DILHR*, 87-0063-PC-ER, 1/11/91; rehearing denied, 2/26/91. In analyzing this question it is appropriate to construe the allegations raised in the complaint in a light most favorable to complainant. *Tafelski v. UW-Superior*, 95-0127-PC-ER, 3/22/96 (p. 7).

The claims of sex harassment and FEA Retaliation which survived the preceding analysis are summarized below showing the amendment requests granted in the prior sections of this ruling.

> I. Claim of Sex Harassment: Respondent Bennett by his actions created an intimidating, and hostile environment by engaging in an ongoing basis offensive, inappropriate conduct, including but not limited to the following:
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> a) deferring to Columbia County police officers' judgment on prosecutorial decisions over complainant Reinhold's and her fellow female assistant district attorney's, Rose Yanke, legal judgment.[4]
>
> b) soliciting police officers' comments on complainant Reinhold's and Ms. Yanke's work performance while refusing to allow complainant Reinhold and Ms. Yanke to respond to said comments, because in the respondent's estimate, it was a waste of time to consider the female viewpoint when respondent had heard the male officer's side of the story.
>
> c) refusing to address the hostile and discriminatory conduct of certain Columbia County Sheriff's Department deputies toward complainant Reinhold and Ms. Yanke.
>
> d) questioning complainant's ability to do her job because of her gender.
>
> e) subjecting complainant to sexually inappropriate and offensive statements including:
>
> i) in reference to an instance in which complainant objected to Mr. Bennett's implication that complainant had sexual relations with some of the police officers, Mr. Bennett threatened complainant saying if she ever "crossed" him, he would have "her tits in a wringer." (Emphasis added.)
> ii) in reference to an instance in which complainant asked for the day off because she had worked the entire previous evening, Mr. Bennett refused the request saying if complainant "had the balls" she would be able to handle staying awake all night and working the following day. (Emphasis added.)
>
> f) degrading and humiliating complainant by chastising her work performance in the presence of other employees.
>
> g) requiring complainant to perform clerical duties at the expense of her legal work including in November 1994; and

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4 This allegation is stated as clarified in ¶6 of the complaint.

forcing complainant to represent herself as a secretary to the court and other members of the Wisconsin bar.

h) saying in November 1994, that he should never have hired a woman assistant district attorney "to do a man's job".

II. Claim of FEA Retaliation: Mr. Bennett threatened to fire complainant in retaliation for her opposition to respondent's conduct.

The Commission first reviews the timeliness of the sex harassment claims. The question presented is whether the events occurring prior to the Actionable Period (items I.a through I.f above) were filed timely under the continuing violation doctrine. The doctrine was discussed extensively by the Commission in *Tafelski v. UW-Superior*, 95-0127-PC-ER, 3/22/96 (pp. 19-24), as noted below in pertinent part:

> The continuing violation doctrine allows an employe to get relief for an otherwise time-barred act by linking it with an action that occurred within the limitations period. *Selan v. Kiley*, 59 FEP Cases 775, 778 (7th Cir., 1992) . . .
>
> The seventh circuit in *Selan, id.*, provided some guidance for application of the continuing violation doctrine . . .
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> > The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period. This court most fully addressed the continuing violation doctrine in *Steward v. CPC International, Inc.*, 679 F.2d 117 [33 FEP Cases 1680] (7th Cir., 1982). In *Stewart*, we discussed three viable continuing violation theories . . . The first theory stems from "cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred." . . . The second theory stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory. . . . The third continuing violation theory stems from cases in which "the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts." . . . This brand of continuing violation has also been referred to as a "serial violation," . . . and as a "pattern of ongoing discrimination." . . .
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> > Under the third theory, the question is whether, in response to the defendants' motion for summary judgment, [the employe] produced sufficient evidence to establish that there existed a

genuine issue of fact whether the defendants' acts were "related closely enough to constitute a continuing violation" or were "merely discrete, isolated, and completed acts which must be regarded as individual violations" . . .The Fifth Circuit has suggested three factors to consider in making this determination:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring . . . or more in the nature of an isolated work assignment or employer decision? The third factor, perhaps of most importance, is the degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employe that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

This court and others have stressed the significance of the third factor:

> What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the [employe] had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment.
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> *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 [50 FEP Cases 1474] (7th Cir., 1989).

It is the third theory of the continuing violation doctrine discussed by the *Selan* court which has potential applicability to the present case.

As to the sex harassment claim, the pleadings taken in a light most favorable to complaint are sufficient to defeat the present motion. Complainant has alleged (in amendments accepted herein) that sex harassment occurred on an ongoing basis and she has provided specific examples including examples allegedly occurring the actionable period. Respondent, however, may renew its timeliness motion if the results of discovery fail to support complainant's claim that sex harassment occurred on an ongoing basis.

The Commission next reviews the timeliness of the FEA Retaliation claim. Complainant has not provided a date upon which Mr. Bennett allegedly threatened to fire her and, accordingly, she has not shown that FEA Retaliation occurred during the

actionable period. Nor would it be appropriate to find the FEA Retaliation as timely filed solely based on a conclusion that the sex harassment claim was timely filed. The acceptance of one discriminatory theory during the actionable period cannot be used under the continuing violation doctrine to "bootstrap" prior claims brought under a separate discrimination theory. *See,* for example, *Trafelski v. UW-Superior*, 95-0127-PC-ER, 3/22/96, where claims of sex discrimination/harassment were found timely filed and the Commission concluded it was inappropriate to stretch the continuing violations doctrine to "bootstrap" handicap claims. The Commission further notes the alleged threat to fire complainant was a discrete event not subject to inclusion under the continuing violation doctrine. Respondent's request to dismiss the FEA Retaliation claim as untimely filed is granted.

ORDER

Respondents' motion to dismiss the whistleblower claims is granted and Mr. Bennett is dismissed as a party. Respondents' motion for summary judgment is granted in regard to the allegation that complainant was held to stricter work hours and overtime than a male attorney. Respondent's motion to dismiss the FEA Retaliation claim as untimely filed is granted.

Complainant's request is granted to amend her complaint to change three allegations of sex discrimination based on unequal treatment to discrimination based on sex harassment (items "a", "b" and "c" in ¶5 of the Findings of Fact).

Complainant's additional amendment requests regarding her claims of sex harassment and FEA Retaliation are granted on a conditional basis. Specifically, complainant has a period of 21 calendar days to cure the technical defects which exist in regard to these allegations.

Respondents' motion to dismiss the claims of sex harassment based on timeliness objections is denied without prejudice.

Dated: September 16, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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