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STATE OF WISCONSIN

PERSONNEL COMMISSION

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SHERYL GULLICKSON,
 Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
 and SOCIAL SERVICES,
 Respondent.

Case No. 95-0133-PC-ER

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RULING ON
 RESPONDENT'S
 MOTION TO
 DISMISS

The Department of Health and Social Services (DHSS) filed a motion to dismiss on October 19, 1995, on the grounds that Ms. Gullickson's charge of discrimination contains some claims which were untimely filed and a separate claim which was prematurely filed. Both parties filed written arguments, with the final argument received by the Commission on December 11, 1995.

BACKGROUND

1. Ms. Gullickson filed a complaint with the Commission on September 6, 1995. The allegations are shown below:

I work at Northern Wisconsin Center for the Developmentally Disabled. The Northern Wisconsin Center is in the process of downsizing. I work as a pharmacist. There are three pharmacists and one chief pharmacist that work at the Northern Wisconsin Center. If the downsizing causes the cutting of one pharmacist position, it is my position that would be cut if the cut is made on seniority basis. I am a 41 year old white female. The other two pharmacists are white males under 40 years old, the chief pharmacist is a white male over 40 years old. If I, the only female pharmacist at the Northern Wisconsin Center, am laid off because I have the least seniority, I will feel that I have been discriminated against. It is my opinion that past hiring practices have lead the the (sic) fact that a female is the least senior pharmacist, while male pharmacists have more seniority.

In 1981 or 1982 the Northern Wisconsin Center posted a pharmacist position. The posting said that the applicant must be willing to work forty hours per week, must have experience on a particular packaging machine, and that the position would only last 6 months. I applied for that position. During a lengthy interview, I was given a number of forms to fill out. While I was

sitting at a table filling out the forms, a male pharmacist knocked at the door. The male pharmacist said that he was dropping off the signed sheet that he needed to drop off before he started to work. I was willing to work forty hours per week. I had experience with the particular machine mentioned in the posting. The male pharmacist hired at that time was only willing to work half time, and did not have experience on the machine mentioned. I inquired about the posting requirements discrepancy. I was told that the male needed the money and that if if (sic) he worked somewhere else, he might have to drive farther, and if that happened, he might have to stay overnight sometimes, which would be impossible to do because his wife was getting too senile to stay alone and besides the position would last only six months. The position lasted several years. His wife still does not appear senile.

In about 1987, I again applied for a pharmacist position at the Northern Wisconsin Center. At that time all three pharmacist positions needed to be filled. I stopped by the Northern Wisconsin Center about one month after my interview. I inquired about the positions and noted that I was still interested in a position. I was told that the delay involved the fact that only males were qualified.

In 1991 I applied for a pharmacist position at the Northern Wisconsin Center - one of the three males hired in about 1987 had quit. I was hired to work at the Northern Wisconsin Center as a pharmacist in 1991, therefore I am the least senior pharmacist. The two male pharmacists hired in about 1987 have more seniority than I do.

2. DHSS alleged (and Ms. Gullickson did not refute) the following information: Ms. Gullickson was hired on December 30, 1991. She is the only female of 4 pharmacists (including the Chief Pharmacist). The least senior male pharmacists were hired on June 14, 1988. The general rule in layoffs is that the least senior employees within a layoff group are the most at risk of layoff.
3. On October 3, 1995, DHSS sent Ms. Gullickson a letter of "official notice" that her position is "at risk" for a future layoff. The planned effective date of the layoff is February 1996. Circumstances could change between the date of official notice and the actual layoffs and such changes might result in Ms. Gullickson not being laid off. DHSS has not issued any official layoff letter concerning Ms. Gullickson's position.

4. Ms. Gullickson raised several additional allegations in her reply to DHSS' motion to dismiss. These additional allegations pertain to a claim of hostile work environment/harassment based on sex.

A. Ms. Gullickson claims that after her first 6 months of employment, she has been the victim of "abusive, hostile and rude treatment" based on the fact that she is female. She characterizes this as a hostile work environment and provided the following examples.

1) One of the technicians, Darlene, has had a "personal vengeance" against Ms. Gullickson which started after Ms. Gullickson did not want to take off on a Friday (no date specified) to go to garage sales with Darlene.

2) Ms. Gullickson alleges that her two male pharmacist co-workers "act as if it were very audacious of me to no longer answer most the the phone calls and check medication carts for large amounts of time in addition to the increased workload. The specific examples provided include:

a) December 1993, one of Ms. Gullickson's male co-workers, Pat, started treating her worse and enlisted other staff, such as Darlene and the technicians, to do the same by giving "disparaging looks" and leaving when she arrives.

b) After December 1993, Ms. Gullickson claims that her male co-worker, Pat, "started doing purposeful errors in the computer on my clients' prescriptions and writing orders on my clients' medication administration records (MARS) that were misleading." His actions lead the Chief Pharmacist to direct Ms. Gullickson to enter prescriptions in the computer by a different (longer) method than she preferred (the same method used by her male co-workers) and to change the the procedure (for everyone) for checking medication carts. Ms. Gullickson provided 7 documents as evidence which are dated 11/2/94, 11/10/94, 11/15/94, 12/5/94, 6/14/95, 6/19/95 and 6/19/95. Ms. Gullickson says "Judy" yelled at her when Ms. Gullickson informed her on 3/31/95, that Judy could print the MARS report because Ms. Gullickson had finished the med checks.

c) In or around April 1994, Ms. Gullickson's two male co-workers said they would quit rather than fulfill the Chief Pharmacist's request that they switch client assignments with Ms. Gullickson.

d) April 3-5, and June 5, 1995, "Judy" was assigned to do Ms. Gullickson's printing. Ms. Gullickson asked her to do copying for a meeting which started 45 minutes later. Ms. Gullickson says that Judy "yelled at me that she needed more notice than that!" Ms. Gullickson also contends that she has never heard Judy tell either male pharmacist that Judy needed more time to do requests.

e) On or about 5/31/95, Ms. Gullickson claims that her male co-worker, Pat, started changing her computer prescriptions in new ways. Supporting exhibits (#8-17) are dated 5/7/94, 9/28/94, 10/25/94, 1/27/95, 3/2/95, 6/22/95, 9/26/95, 6/16/95, and 8/9/95.

f) On 6/23/95, a female LPN made loud, critical remarks to Darlene about Ms. Gullickson's handwriting. Darlene often complains about Ms. Gullickson's handwriting, but not about the handwriting of her male co-workers.

g) On 7/10/95, an extra tablet was on one of Ms. Gullickson's client's med carts and this was not her own error.

h) On 7/11/95, a nurse called the pharmacy and spoke (presumably) with one of Ms. Gullickson's male co-workers. The nurse was calling in 2 prescription orders for one of Ms. Gullickson's clients. Neither of the male co-workers informed Ms. Gullickson of the telephone order and, as a result, she had to do them quickly the next day and arrange for security to deliver them.

i) On 10/4/95, a doctor had the pharmacy technicians page Ms. Gullickson because no one knew where Pat was.

j) On 10/17/95, Ms. Gullickson went to work with a cold. She decided she would not answer phones because she thought it would be impolite to cough in the caller's ears. She failed to share her decision with others. As a result, Darlene "scowled" at Ms. Gullickson and Pat yelled at Ms. Gullickson, bragged that he yelled at her and left the pharmacy without saying where he was going.

k) On 10/31/95, Darlene paged Ms. Gullickson to fill orders at the pharmacy and explained that a male co-worker, Brian, was not paged because he had work to do elsewhere.

3) Ms. Gullickson alleges that the Chief Pharmacist contributed to the harassment. The specific examples provided include:

a) Sometime before January 1993, Ms. Gullickson developed a new way of dealing with Consultant Pharmacist Reports. She received praise

for her work from Judy Wittmier (Client Services Director) and from the Center Director. Yet in January 1993, the Chief Pharmacist said she had to "revise" her reports to omit quotes or facts that might be offensive.

b) June 1993, Chief Pharmacist's assignment of medication cart checking was unfair because it gave more work to Ms. Gullickson than to her male co-workers.

c) On December 9, 1994, a meeting of pharmacy personnel was held where half of the 18 agenda items "directly affected" Ms. Gullickson. She felt a different rule was given to her than her male co-workers for giving notice of when she was leaving the pharmacy. She also felt the technicians did her carts last, a problem rectified by the Chief Pharmacist, but she feels the technicians still do this when the Chief Pharmacist is out of the office.

d) Effective 2/1/95, the Chief Pharmacist redistributed the workload in response to production numbers gathered by Ms. Gullickson which indicated that her workload was higher than her two male co-workers. However, the Chief Pharmacist gave her additional work starting 6/6/95, due to a complaint from her male co-worker, Pat, that he could not handle his share of the redistributed workload.

4) Additional alleged harassment based on sex.

a) On February 8, 1994, Darrell Arndt held Ms. Gullickson responsible for failing to notify him within 24-48 hours after a prescription was ordered.

b) On February 10, 1994, Ms. Gullickson was allowed to give her opinion regarding when (what time of day) a client's cholesterol lowering medication should be given, but a nurse's recommendation was chosen.

c) At a meeting on 9/28/95, Ms. Gullickson explained why she listed duplicates of some items in the computer. Dr. Helen Gonzaga said the "output of computers can only be as good as the person running it -- it cannot be any better than the person is!"

d) Ms. Gullickson alleges that Dr. Gonzaga also teased her "in a very belittling, demeaning, disparaging manner" by such things as not sitting by Ms. Gullickson at meetings, not answering her questions directly, and by talking to staff about how much staff liked Ms. Gullickson's male predecessor. No specific dates were given.

3. Ms. Gullickson's response to DHSS' motion to dismiss included the following paragraph:

The Personnel Commission should find there is probable cause to believe that [DHSS] has discriminated against me on the basis of my sex in giving me official notice that I am "at risk" of layoff.

DISCUSSION

Standard of Review

The motion to dismiss filed by DHSS is reviewed here under the standard described in Phillips v. DHSS & DETE, 87-0128-PC-ER (3/15/89, aff'd Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992), as follows:

[T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

Timeliness Issues - Original Complaint

The time period for filing a complaint is "no more than 300 days after the alleged discrimination . . . occurred." s. 111.39(1), Stats. Ms. Gullickson filed her complaint on September 6, 1995. The resulting 300 day period commenced on November 10, 1994 and ends on September 6, 1995. Alleged events falling within this 300-day period are timely.

The complaint as initially filed includes the timely allegation that DHSS gave her a "risk of layoff" notice. She attributes sex/age discrimination to her receipt of the notice citing specific historical hires which occurred in 1987 and 1991. She failed to file complaints within 300 days of the 1987 and 1991 hiring decisions. Accordingly, she has no separate right of recovery due to the allegations that she was not hired in 1987 and in 1991, but such information may be considered as evidence of DHSS' motive for giving her a risk of layoff notice.

Ripeness Issue - Original Complaint

DHSS has not made a decision that Ms. Gullickson's position will be eliminated in February 1996. All DHSS has done is to provide notice to staff who are at risk of being laid off in February 1996, based upon their seniority.

The risk notice has not adversely affected her employment status. Nor has DHSS yet determined that Ms. Gullickson will be laid off.

Under these circumstances, Ms. Gullickson's original charge of discrimination was filed prematurely. Of course, she may file a new charge of discrimination if DHSS does lay her off some time in the future.

Additional Allegations (as summarized in par. 4 of the Background section)

Ms. Gullickson raised additional allegations in her response to DHSS' motion to dismiss, as summarized in par. 4 of the Background section in this ruling. The relief she continued to seek by presenting the additional allegations was for the Commission to find that discrimination occurred in regard to her receipt of the at risk notice. She did not say that the additional information was provided to stand together as a separate complaint of sex harassment, nor did the Commission treat it as such.

ORDER

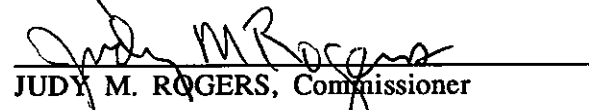
The respondent's motion to dismiss is granted and this case is dismissed.

Dated December 20, 1995.

JMR


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