STATE OF WISCONSIN | PERSONNEL COMMISSION

DEMETRIA BUTLER,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES [DEPARTMENT OF CORRECTIONS],[1]
Respondent.

Case No. 95-0160-PC-ER

DECISION
AND
ORDER

The Commission, after having reviewed the Proposed Decision and Order, the objections thereto, and the record in this matter, adopts the following as its final Decision and Order in this case. It should be noted that, in adopting this final Decision and Order, the Commission has not modified any of the credibility determinations or findings of fact reached by the hearing examiner, except as specifically noted and explained.

NATURE OF THE CASE

This is a charge of WFEA (Wisconsin Fair Employment Act), Subchapter II, Chapter 111, Stats., discrimination on the basis of sexual harassment with respect to conditions of employment. The issue for hearing as set forth in the prehearing conference report dated October 22, 1996, is as follows:

> Whether there was a violation of the Fair Employment Act in terms of sexual harassment of complainant with respect to the alleged conduct of Mr. Williams, Institution Unit Supervisor 1, as set forth in complainant's letter dated November 23, 1995.

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[1] Pursuant to 1995 Wisconsin Act 27, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the position that is the subject matter of this proceeding is now held by the Secretary of the Department of Corrections.

The parties entered into a partial stipulation of facts which was marked and received as Respondent's Exhibit #1. The Commission incorporates this stipulation as the first four findings of fact below (formal parts omitted).

FINDINGS OF FACT

1. On August 10, 1995, The Department of Health And Social Services (DHSS) Division of Youth Services (DYS) issued a disciplinary letter to one of its Ethan Allen School (EAS) supervisory employes named Michael Williams.[2] See Attachment A[3], which consists of the August 10, 1995, letter and its attachment titled **Detailed Descriptions of Sexual Harassment and Retaliation of Four Female Employes by Michael Williams,** and an August 14, 1995, letter to Michael Williams from Jean Schneider, Superintendent of EAS.

2. Michael Williams engaged in the acts set forth in numbered paragraph 2 in the attachment to Attachment A titled **Detailed Descriptions of Sexual Harassment and Retaliation of Four Female Employes by Michael Williams.**[4]

3. Michael Williams was suspended with pay for the period from June 23, 1995, to August 13, 1995. The discipline imposed on Michael Williams by Attachment A was effective August 13, 1995. Michael Williams resigned from employment at EAS on September 30, 1995.

4. Demetria Butler [complainant] never reported Michael Williams' sexual harassment of her to any EAS supervisor until asked to do so on June 22, 1995.

5. Attachment A referred to above includes the following specific acts committed by Mr. Williams with respect to complainant:

> On June 22, 1995, Demetria Butler reported that beginning approximately after Christmas 1994, and continuing until approximately mid-June you would come to Bruce or Andrews cottages and make sexually oriented statements to her. Ms. Butler stated that she told you several times that she is married, and that she generally avoided you because she was uncomfortable. She stated that you generally approached her beyond the earshot of others, or asked you to meet alone with her before engaging in behavior she found harassing. Specifically:

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[2] This letter imposed an involuntary demotion to a non-supervisory position.

[3] This reference to Attachment A was included in the parties' stipulation. Attachment A is not appended to this Decision and Order but all relevant portions have been included in the Findings of Fact.

[4] The parties further stipulated that "complainant may prove additional acts of such harassment."

a) You made various statements while looking at her suggestively (by staring at her buttocks and rolling your eyes). The most recent of these occurred in mid-June. Some of the statements were: "Oh, you look good today.", "When are we are going to hook up?", "Is it hot enough for you?", and "I don't mean that kind of hot."

b) You repeatedly tried to obtain Ms. Butler's consent for you to visit her at home, ostensibly to hook up her computer. Ms. Butler felt that there was a clear sexual expectation inherent in these requests.

c) You asked Ms. Butler to attend the Wisconsin Association of Black State Employes' convention with you in April of 1995. You communicated a sexual expectation in this request by indicating that the two of you party at WABSE.

d) In mid-June, 1995 when Ms. Butler inquired about obtaining a straight first shift assignment, you initially responded that no such positions were available: then you asked, "What will I get out of it?" In the context of the pattern of sexual comments, this was interpreted to have a sexual connotation.

e) You told Ms. Butler, "I'd better stop talking to you, or you will write me up."

6. Complainant began her employment at EAS in August 1994 as a temporary employe. She began as a permanent employe on October 9, 1994, and was assigned as a first shift utility YC (Youth Counselor). She was on probation for the first six months of her permanent employment, which meant her employment was subject to termination at any time without the employer having to demonstrate "just cause" through either a contractual grievance process or other means of review.

7. As a utility YC, complainant was given different assignments depending on the needs of EAS management. Her immediate supervisor was William Gauthier, EAS Scheduling Supervisor. From time to time she was assigned to Bruce Cottage, where her activities were supervised by Michael Williams.

8. From about late December 1994 until about mid-June 1995, Mr. Williams engaged in the conduct set forth in Finding of Fact 5., above. Complainant

did not come forward to complain to management about Mr. Williams' behavior before she was encouraged to do so on June 22, 1995, in part because she felt that a complaint about Mr. Williams would not be taken seriously because he was a member of management with substantial seniority at EAS.[5]

9. As supervisor of Bruce Cottage, Mr. Williams had supervisory authority over complainant when she was assigned there. He did not have direct authority to have terminated her probationary employment, or otherwise discipline her, but he was in a position to have input into such transactions, as were the supervisors of the other sites to which complainant had been assigned.

10. Complainant was interested in moving from a utility assignment to a permanent assignment at Bruce Cottage, because she believed the opportunity for overtime was good there.[6] The procedure for obtaining a permanent assignment at Bruce Cottage involved two alternatives. First, a vacant position would be posted for filling under the contract transfer process, and the employe with the most seniority who posted for the vacancy would receive the transfer. Under this alternative, Mr. Williams had no control over who would be given the transfer. Second, if the position were not filled in this fashion, management would exercise its discretion to choose from among those employes who had submitted "letters of interest" for the vacancy to Gauthier, without being required to choose the most senior. Under this alternative, Mr. Williams was given the opportunity to select whom he wanted from among those who had submitted letters of interest.

11. In mid-June 1995, when complainant inquired about obtaining a permanent first shift position at Bruce Cottage, and Williams replied "What will I get out of it?" complainant was not familiar with the system described above for filling

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[5] In the Proposed Decision and Order, the hearing examiner also found that complainant had not come forward because she was afraid that she would not pass probation. As discussed in the Opinion section, the Commission did not find this testimony be complainant persuasive because she did not come forward even after she had passed probation.

[6] Complainant was also interested in assignment to the "STRIDE" program. Since Mr. Williams had not control over such assignments, reference to the transfer issue will only involve Bruce Cottage.

such vacancies At some point, she gave Williams a document expressing her interest in transferring to a Bruce Cottage position.

12. The only transfer that was made to Bruce Cottage from April 1995 until Williams resigned his employment at EAS, effective September 30, 1995, involved a third shift position to which an employe with a seniority date of October 22, 1990, transferred, effective July 27, 1995.

13. There have been several transfers to Bruce Cottage vacancies subsequent to Mr. Williams' resignation and to the transaction set forth in the preceding paragraph. Complainant never submitted either a request for contractual transfer or a letter of interest with respect to any of these later vacancies, and thus was not in a position to have been considered for transfer to them.

14. EAS management first learned that Williams had been involved in sexual harassment when another female employe came forward with a complaint about him on June 22, 1995. In the process of responding to this complaint, management interviewed three other female employes, including complainant, who all told about being harassed by Williams.

15. Mr. Williams had been accused of sexual harassment earlier in 1995 by a female EAS employe (other than the four with respect to whom Williams eventually was disciplined). This accusation did not result in discipline, but management counseled Mr. Williams regarding the proper way for a supervisor to interact with female employes.

16. Respondent had policies in place which clearly prohibited sexual harassment and provided readily accessible means for employes to complain to management about sexual harassment. Complainant received training in, and a copy of, these policies during her orientation after she was hired.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish that there was a violation of the WFEA in connection with the conduct of supervisor Williams, and that she is entitled to the remedy she seeks.

3. Complainant has not established that there was a violation of the WFEA in connection with Williams' conduct.

OPINION

The WFEA prohibits both the "quid pro quo" and "hostile environment" types of sexual harassment. Section 111.32(13), Stats., provides:

> "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. . . "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employe's work performance or to create an intimidating, hostile or offensive work environment.

Section 111.36, Stats., includes the following:

> (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer . . . or other person:
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> (b) Engaging in sexual harassment; or implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment; or making or permitting acquiescence in, submission to or rejection of sexual harassment the basis or any part of the basis for any employment decision affecting any employe . . . or permitting sexual harassment to have the purpose or effect of substantially interfering with an employe's work performance or of creating an intimidating, hostile or offensive work environment. Under this paragraph, substantial interference with an employe's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable

> person under the same circumstances as the employe would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment. . . .
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> (3) For purposes of sexual harassment claims under sub. (1)(b), an employer, labor organization, employment agency or licensing agency is presumed liable for an act of sexual harassment by that employer . . . or by any of its employes . . . if the act occurs while the complaining employe is at his or her place of employment or is performing duties relating to his or her employment, if the complaining employe informs the employer . . . of the act, and if the employer . . . fails to take appropriate action within a reasonable time.

In the instant case, there are two primary issues with respect to liability—whether Williams engaged in conduct which constituted either quid pro quo or hostile environment sexual harassment, and, if so, whether respondent is liable for a violation of the WFEA's prohibition of sexual harassment with respect to that conduct.

The first question here is whether the conduct by Mr. Williams which is under consideration here created a work environment for complainant which violated the WFEA. The WFEA utilizes an objective test for evaluating this question:

> [S]ubstantial interference with an employe's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employe would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

In addition to the presence of an objectively hostile or offensive work environment, liability also requires that the complainant herself perceived the work environment that way. *See Harris v. Forklift Systems, Inc.,* 510 U. S.17, 126 L. Ed. 2d 295, 114 S. Ct. 367, 63 FEP Cases 225 227-28 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the

environment to be abusive, the conduct has not actually altered the conditions of the victim's employment.").

A review of cases decided under Title VII provides some guidance as to the type of conduct considered violative of the prohibition against sexual harassment. In *Baskerville v. Culligan Intl. Co.,* 50 F. 3d 428, 67 FEP Cases 564 (7th Cir. 1995), the court stated as follows, in relevant part:

> Baskerville was hired on July 9, 1991, as a secretary in the marketing department of Culligan, a manufacturer of products for treating water. A month later she was assigned to work for Michael Hall, the newly hired Western Regional Manager. Baskerville testified, we assume truthfully, to the following acts of sexual harassment of her by Hall between the date of his hire and February 1992, a period of seven months:
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> 1. He would call her "pretty girl," as in "There's always a pretty girl giving me something to sign off on."
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> 2. Once, when she was wearing a leather skirt, he made a grunting sound that sounded like "um um um" as she turned to leave his office.
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> 3. Once when she commented on how hot his office was, he raised his eyebrows and said, "Not until you stepped your foot in here."
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> 4. Once when the announcement "May I have your attention, please" was broadcast over the public-address system, Hall stopped at Baskerville's desk and said, "You know what that means, don't you? All pretty girls run around naked."
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> 5. He once called Baskerville a "tilly," explaining that he uses the term for all women.
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> 6. He once told her that his wife had told him he had "better clean up my act" and "better think of you as Ms. Anita Hill."
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> 7. When asked by Baskerville why he had left the office Christmas Party early, Hall replied that there were so many pretty girls there that he "didn't want to lose control, so I thought I'd better leave."

8. Once when she complained that his office was "smoky" from cigarette smoke, Hall replied, "Oh, really? Were we dancing, like in a nightclub?"

9. When she asked him whether he had gotten his wife a Valentine's Day card, he responded that he had not but he should because it was lonely in his hotel room (his wife had not yet moved to Chicago) and all he had for company was his pillow. Then Hall looked ostentatiously at his hand. The gesture was intended to suggest masturbation.

We do not think that these incidents, spread over seven months, could reasonably be thought to add up to sexual harassment. The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. It is not designed to purge the workplace of vulgarity. Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is not consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 40 FEP Cases 1822 (1986); *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 63 FEP Cases 225 (1993); *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007, 65 FEP Cases 688 (7th Cir. 1994). On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers. *Meritor, supra*, 477 U.S. at 61; *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 42 FEP Cases 631 (6th Cir. 1986); *Katz v. Dole*, 709 F.2d 251, 31 FEP Cases 1521 (4th Cir. 1983). We spoke in *Carr* of "the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing." 32 F.3d at 1010. It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other; and when it is uncertain on which side the defendant's conduct lies, the jury's verdict, whether for or against the defendant, cannot be set aside in the absence of trial error. Our case is not within the area of uncertainty. Mr. Hall, whatever his qualities as a sales manager, is not a man of refinement; but neither is he a sexual harasser.

He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on prime-time television. The comment about Anita Hill was the opposite

> of solicitation, the implication being that he would get into trouble if he didn't keep his distance. . . . Some of his repartee, such as, "Not until you stepped your foot in here," or, "Were we dancing, like in a nightclub?," has the sexual charge of an Abbott and Costello movie. The reference to masturbation completes the impression of a man whose sense of humor took final shape in adolescence. It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find Hall's patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain. The infrequency of the offensive comments is relevant to an assessment of their impact. A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage. *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 64 FEP Cases 523 (7th Cir. 1994); *Doe v. R. R. Donnelly & Sons Co.*, 42 F.3d 439, 66 FEP Cases 981 (7th Cir. 1994). . . .
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> It is a little difficult to imagine a context that would render Hall's sallies threatening or otherwise deeply disturbing. But we need not test the breadth of our imagination. Hall and Baskerville were never alone outside the office, and there is no suggestion of any other contextual feature of their conversations that might make Hall a harasser. We conclude that no reasonable jury could find that Hall's remarks created a hostile working environment.

In *Dockster v. Rudolph*, 53 FEP 642 (7th Cir. 1990), the complainant's immediate supervisor, over a period of two weeks' time, asked her to join him for lunch on her first day of employment and insisted on sitting on the same side of the booth with her even while there was no one sitting on the opposite side of the booth; during this lunch, asked her about her plans for the evening and, even after she indicated she had arranged to meet her roommate, insisted on walking her to her roommate's office; on several occasions, would enter her office, shut and lock the door, sit opposite her, and just stare at her; would play with her hair; on one occasion, while she was bent over, came up behind her, grabbed her waist, and said, "I could drive you crazy."; frequently called her at home requesting that she meet him at various places; on one occasion, asked her to accompany him to a restaurant to meet a client where he again insisted on sitting on the same side of the booth, grabbed her and

tried to kiss her several time, again attempted to kiss her on the way home, and fondled her breast. The court concluded that this conduct constituted actionable hostile environment sexual harassment.

In *Hopkins v. Baltimore Gas & Electric*, 77 F.3d 745, 70 FEP Cases 184 (4th Cir. 1996), the court evaluated thirteen incidents involving two male employees which had occurred over a period of seven years, including incidents during which Swadow, the alleged harasser, followed Hopkins into the men's room and, on one occasion, pretended to lock the door and said, "Ah, alone at last."; Swadow attempted to kiss Hopkins in the receiving line at Hopkins' wedding; Swadow placed an illuminated magnifying glass over Hopkins' crotch and asked, "Where is it?"; Swadow asked Hopkins, "On a scale of one to ten, how much do you like me?"; Swadow bumped into Hopkins and said, "You only do that so you can touch me."; Swadow attempted to force himself into a one-person revolving door with Hopkins and touched Hopkins' back; and Swadow regularly commented on Hopkins' appearance. The court stated as follows in reaching its conclusion that Hopkins had failed to show actionable hostile environment sexual harassment:

> Swadow's alleged conduct toward Hopkins was sexually neutral or, at most, ambiguous. Notably, Hopkins has not asserted that Swadow ever made an overt sexual proposition or touched Hopkins in a sexual manner. While Swadow's conduct was undoubtedly tasteless and inappropriately forward, we cannot conclude that it was "of the type that would interfere with a reasonable person's work performance to the extent required by Title VII." (citation omitted) . . .
>
> While we do not approve of Swadow's apparent willingness to offend and provoke employees with his ambiguous sexual innuendos, Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace. When presented in other Title VII cases with conduct of the type alleged by Hopkins in this case, we have consistently affirmed summary judgment dismissing the claims. See, e.g., *Dwyer v. Smith*, 867 F.2d 184, 48 FEP Cases 1886 (4th Cir. 1989) (affirming directed verdict in Title VII case despite evidence that female police officer was subjected to pornographic material placed in her station mailbox and to fellow officers' sexually explicit conversations); *Harris v. Clyburn*, 1995 WL 56634, at 3 (4th Cir. 1995)

> (unpublished) (per curiam) (affirming summary judgment for employer where "only specific factual allegation of sexual harassment [was] occasional tickling [by her male superior] in the hallway"); *Cobbins v. School Bd. Of Lynchburg, Va.,* No. 19-1754, slip op. At 7-10 (4th Cir. Jan. 14, 1991) (unpublished) (per curiam) (holding that where male teacher asked female teacher out for a drink, asked her to perform tasks she perceived as secretarial, and struck her in a fight, purported harassment was not gender-based and was not sufficiently severe or pervasive). See also *Baskerville*, 50 F.3d at 430-31 (overturning verdict because evidence that her male supervisor called her "pretty girl," commented on her attire, and made "vulgar banter tinged with sexual innuendo" did not establish actionable Title VII claim).

In *Harris v. Forklift Systems, Inc.,* 114 S.Ct. 367, 63 FEP Cases 225 (1993), the Court held that the required determination as to whether actionable hostile environment sexual harassment has occurred can be made only by evaluating all of the circumstances—the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the worker's performance.

The record here does not support a conclusion that the conduct of Mr. Williams under consideration here could be considered "pervasive" as it related to complainant and her work environment. Specifically, the record reflects that complainant was assigned to Bruce Cottage where Mr. Williams was the supervisor only "from time to time"; that complainant "generally avoided" Mr. Williams at work; and that she has listed only six statements (See Findings of Fact 5(a), 5(d), and 5(e), above), an unquantified number of requests to visit complainant at home (See Finding of Fact 5(b), above), and one invitation to attend a convention together, over a period of six months.[7]

A comparison of the fact situation here with those presented in the Title VII cases cited above leads to the conclusion that this record does not support a conclusion

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[7] In the Proposed Decision and Order (pages 6-7), the hearing examiner described the allegedly offensive conduct of Mr. Williams as occurring in "a continuing stream." However, the Commission has concluded, based on the fact that complainant's contact with Mr. Williams in the workplace was sporadic only, that this characterization is not accurate.

that Mr. Williams' conduct was sufficiently "severe." The statements made by the immediate supervisor in *Baskerville*, where the court decided that no actionable hostile environment sexual harassment had occurred, were more sexually charged and more vulgar than those made by Mr. Williams here. This serves to counterbalance the fact that, in addition to making the statements, Mr. Williams also made requests to visit complainant outside of work, and to "party" and "hook up" with her. Providing further counterweight in *Baskerville* to these invitations by Mr. Williams is the fact that the conduct complained of by Ms. Baskerville was carried out by her immediate supervisor, the Western Regional Manager of a large national corporation, who presumably had significant control over all the incidents of her employment and had reason to be present at complainant's work site each day. This contrasts with the situation under consideration here where Mr. Williams was not complainant's immediate supervisor, she had occasion to work directly with him only "from time to time," and she "generally avoided" him at work.

In *Dockster*, cited above, where the court decided actionable hostile environment sexual harassment had occurred, the conduct engaged in by complainant's immediate supervisor involved touching; kissing; fondling complainant's breast; frequent calls to complainant's home; specific invitations to socialize; and requests to get together outside of work, some of which were misrepresented to the complainant as business-related client contacts. This conduct is clearly more severe than that engaged in by Mr. Williams which did not involve any physical contact, calls to complainant's home, or lies perpetrated to get complainant to go out with him. In addition, the fact that, in *Dockster,* these numerous incidents occurred over a period of two weeks' time and were carried out by the complainant's immediate, on-site supervisor, lead to the conclusion that they were significantly more pervasive than those under consideration here.

In *Hopkins*, cited above, where the court decided that actionable hostile environment sexual harassment had not occurred, the conduct complained of was spread over a period of seven years, as opposed to the six months under consideration

here, so it would have to be concluded that it was less pervasive in *Hopkins* than here. However, it included at least three incidents of touching, and an incident during which the alleged harasser focused attention on Hopkins' genital area. These incidents are more severe than the statements made by Mr. Williams, and serve to counterbalance the fact that the invitation to socalize was more diffuse and indirect under the facts in *Hopkins* than here.

It is concluded that the severity of the conduct under consideration here is more closely comparable to that in the Title VII cases cited above in which the courts found that no actionable hostile environment sexual harassment had occurred, and that, as a result, complainant has failed to show an objectively hostile environment.

If complainant had succeeded in demonstrating an objectively hostile environment, she would also have to demonstrate the existence of a subjectively hostile environment in order to prevail here.[8] The Commission notes in particular two aspects of this record which suggest that complainant did not regard Mr. Williams' conduct as particularly objectionable. One is that she never complained about Mr. Williams' actions until management explicitly encouraged her to do so. The other is that she desired to work on the first shift at Bruce Cottage on a permanent basis, notwithstanding that would have resulted in more or less continuous contact with Mr. Williams, instead of only periodic contact, which was the case with her utility position. Complainant's explanation that she was concerned about not being believed and the possibility of retribution, particularly during the period of her probation, appears to be credible. However, the weight to be accorded this explanation is reduced by the fact that complainant did not come forward even after her probationary period was completed on or around April 9, 1995. The reason given by complainant for wanting the permanent assignment to Bruce Cottage was the increased opportunity for overtime this assignment would have provided. However, this reason is not sufficiently strong or definite, particularly given the showing in the record that complainant did not

generally seek overtime due to her child care situation, to defeat the conclusion that complainant did not regard Mr. Williams' conduct toward her as so abusive or hostile as to alter the conditions of her employment. (*See, Rutland v. UW*, 92-0221-PC-ER, 6/22/95.)

Federal courts have characterized quid pro quo sexual harassment under Title VII as occurring "'where specific benefits of employment are conditioned on sexual demands' by the victim's supervisor." *Harrison v. Eddy Potash Inc.*,73 FEP Cases 1384, 1388 (10th Cir. 1997) (citations omitted). See also, *Nichols v. Frank,* 66 FEP Cases 614, 616 (9th Cir. 1994). The first question that must be answered in this case is whether supervisor Williams' comment about the transfer to Bruce Cottage should reasonably be considered a quid pro quo demand. A relevant inquiry in this regard would be whether complainant considered Mr. Williams' statement a threat to block her permanent assignment to Bruce Cottage. Apparently she did not, since she failed to mention it when she was first interviewed about Mr. Williams' harassment. Would it have been reasonable, given the totality of circumstances present here, for complainant to have regarded the statement as a threat? The record here supports an answer in the negative for the following reasons:

1. This question is required to be resolved within the context of the work environment as a whole. Given the Commission's conclusion that Mr. Williams' conduct was not sufficiently pervasive or severe, using either an objective or subjective standard, to constitute actionable hostile environment sexual harassment, it is concluded that Mr. Williams' statement under consideration here should not reasonably be regarded as a threat.

2. There has been no showing that Mr. Williams' statements and actions, all of which appear to be non-threatening and non-insistent on their face, should be interpreted in any other way.

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[8] In the Proposed Decision and Order, the hearing examiner found that complainant had demonstrated a subjectively hostile work environment. The basis for the Commission's contrary finding is explained in this paragraph.

3. There has been no showing that Mr. Williams took any action to influence any incident of complainant's employment despite the fact that, as complainant has represented, she repeatedly, from the time the subject conduct was first displayed by Mr. Williams, rejected his invitations and reminded him that she was married.

The Commission concludes that complainant has failed to show quid pro quo sexual harassment here.

If the Commission had found sexual harassment which violated the WFEA here, the final question would involve whether respondent would be liable for this harassment.

The employer is liable for quid pro quo harassment by a supervisor, *see, e. g., Karibian v. Columbia University,* 63 FEP Cases 1038, 1042, 14 F. 3d 773 (2d Cir. 1994) ("Because the quid pro quo harasser, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer for quid pro quo harassment." (citation omitted); *Kauffman v. Allied Signal,* 59 FEP Cases 1038 (6th Cir. 1992). Had the Commission found that quid pro quo harassment had occurred here in regard to the "What will I get out of it?" statement made by Mr. Williams, the respondent would be liable for such harassment. The question would then center on determining what the appropriate remedy would be. Complainant seeks back pay on the theory she would have earned more in overtime had she transferred to Bruce Cottage. However, the record reflects that Mr. Williams never had an opportunity to have vetoed such a transfer. There would be no basis for a finding that any illegal action either by or attributable to respondent caused complainant to lose salary or the opportunity to earn additional salary.

With respect to liability for hostile environment sexual harassment, the WFEA provides that the employer is *presumed* liable for an act of sexual harassment "if the complaining employe informs the employer . . . of the act, and if the employer . . . fails to take appropriate action within a reasonable time." §111.36(3), Stats. Respondent acted immediately after complainant (and the other three female employes

who had been harassed by Mr. Williams) told management about Mr. Williams' actions. It suspended him with pay and then demoted him to a non-supervisory position. While complainant argues that this penalty was insufficient, the record does not support such a conclusion. The key factor here from the standpoint of harassment is that the demotion, in addition to imposing a substantial material penalty, took Mr. Williams out of the supervisory position he had used to further his allegedly harassing behavior. However, as respondent points out in its post-hearing brief, even though it avoids the *presumption* that could have been created by operation of §111.36(3), Stats., this does not resolve the question of liability.

In *Rutland v. UW*, 92-0221-PC-ER, 6/22/95, the Commission cited *Meritor Savings Bank v. Vinson,* 477 U. S. 57, 40 FEP Cases 1822, 1829 (1986), for the proposition that agency principles are used to determine whether an employer is liable for the acts of a supervisor:

> [W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. . . . we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. Ibid.

Section 219 of the Restatement provides:

> When Master Is Liable for Torts of His Servants
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> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
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> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> (a) the master intended the conduct or the consequences, or
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> (b) the master was negligent or reckless, or
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> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

In the instant case, it is clear that Mr. Williams' conduct which is at issue here was not within the scope of his employment. It also is clear that respondent did not intend the conduct, and the conduct did not violate a non-delegable duty of the employer. Complainant makes the argument that respondent was negligent in its supervision of Mr. Williams. This argument is premised primarily on the fact that the August 10, 1995, letter of discipline refers to previous counseling he had received regarding certain interactions he had had with female employes, including one situation regarding a complaint of sexual harassment lodged against him by a female employe in March 1995. However, the record does not reflect that, prior to the statements of the four female employes (including complainant) in June 1995, respondent had a sufficient basis to have proceeded with discipline against complainant.

Moving to subsection (2)(d) of the Restatement, it does not appear that Mr. Williams "purported to act or to speak on behalf of the principal." The question would remain under (2)(d), however, as to whether Mr. Williams "was aided in accomplishing the tort by the existence of the agency relation." In *Rutland v. UW*, 92-0221-PC-ER, 6/22/95, the Commission relied on the following holding from *Karibian v. Columbia University,* 14 F. 3d 773, 63 FEP Cases 1038, 1044 (2d Cir. 1994) in addressing this aspect of the question of liability:

> We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment and did nothing about it. (citations omitted) *Rutland* at p. 13.

In *Karibian*, the employer was held liable for the hostile working environment created by one of its supervisors, and relied on this supervisor's authority to alter Ms. Karibian's work schedule and assignments, to give her promotions and raises, and, at

least apparently, to fire her, in reaching this conclusion. In *Rutland,* the Commission concluded that under the circumstances before it, the employer was not liable for the acts of the harasser, in part because the "hybrid of academic and employment elements presented by the practicum relationship" made it "difficult . . . to draw a clear conclusion that Mr. Hall had the actual or apparent authority to alter complainant's employment (to hire, fire, or promote) or to affect to a sufficient extent the incidents of complainant's employment (such as rate of pay or discipline)." *Id.* at pp. 13-14. This principle was discussed further in *Harrison v. Eddy Potash, Inc.,* 73 FEP Cases 1384, 1390 (10th Cir. 1997), a case which followed the principle set forth in *Karibian*:

> As previously described, the *Karibian* interpretation allows an employer to be held liable, even if a sexual harassment policy is in place and is made known to the plaintiff, where the supervisor uses his actual or apparent authority to aid or facilitate his perpetuation of the harassment. We emphasize, however, that this interpretation does not allow liability to attach where the harasser's agency relationship merely provided him with proximity to plaintiff. (citation omitted)

In *Harrison,* the court looked to whether the employer delegated authority to the supervisor, who was the alleged harasser, to control the complainant's work environment.

Here, although Mr. Williams, as an occasional site supervisor of complainant, may have had the opportunity to provide, along with other site supervisors, input into decisions made by complainant's immediate supervisor relating to complainant's termination, promotion, rate of pay, or discipline, the record does not show that Mr. Williams had any significant, independent authority in these areas. In addition, the record shows that Mr. Williams had the independent authority to control non-contractual transfers to Bruce Cottage. In the context of a hostile working environment claim, the extent of Mr. Williams' authority over the incidents of complainant's employment would not be considered sufficient to create liability for respondent had the Commission concluded that Mr. Williams' conduct was sufficiently severe or pervasive to constitute a violation of the WFEA.

ORDER

This complaint is dismissed.

Dated: January 14, 1998

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the

Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95