STATE OF WISCONSIN PERSONNEL COMMISSION

LaDELTA McCARTNEY,
Complainant,

v.

Superintendent, UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY,
Respondent.

Case No. 96-0165-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of sex discrimination and of retaliation for engaging in protected fair employment activities. A hearing was held on October 26, 1998, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and, according to the schedule to which the parties agreed, the briefing period was to conclude on January 15, 1999.

FINDINGS OF FACT

1. Complainant began employment with respondent on August 14, 1995, as a Custodian 1. After successfully completing a six-month probationary period, her position was reclassified to Custodian 2. Complainant transferred to the third (night) shift in February or March of 1996. David Hyatt became complainant's first-line supervisor effective June 9, 1996. As complainant's supervisor, Mr. Hyatt had the authority to evaluate her performance and to recommend discipline. Mr. Hyatt rated complainant's work performance as satisfactory, and did not recommend she be disciplined.

2. Prior to June of 1996, complainant's performance and attendance had been satisfactory.

3. During the time that she was supervised by Mr. Hyatt, complainant was the only female under his supervision.

4. During the time that she was supervised by Mr. Hyatt, complainant's assignment was to clean certain rooms in the operating area. In order to properly complete her cleaning responsibilities, complainant was required to remove the furniture and equipment from these rooms, and to replace them once they and the room had been cleaned. Four other members of the custodial staff were responsible for cleaning the remaining parts of the operating area on the third shift.

5. In the operating area during the third shift, a medical team consisting of three nurses, physicians, and others were present.

6. During a typical shift, Mr. Hyatt would personally check on each of his 17 to 19 subordinate employees at least once while they were in their assigned work area. These contacts would usually not exceed a few minutes in duration. Mr. Hyatt would also see these employees in the smoking and break areas. At most times during the third shift, there would be several people in both the smoking and break areas.

7. At all relevant times, Ed Koroch was Mr. Hyatt's supervisor and Tom Peck was Mr. Koroch's supervisor.

8. On or around August 6, 1996, complainant suffered a work-related injury and, as a result, was on medical leave through September 10, 1996.

9. On August 30, 1996, complainant met with Mr. Koroch. During this meeting, complainant advised Mr. Koroch that, due to the fact that she had been sexually harassed at her work site prior to her injury, she was requesting a 30-day personal leave of absence in order to find other employment. Mr. Koroch, consistent with respondent's practice, suggested that complainant present her request and her allegation of sexual harassment to Sue Minihan in the Human Resources Department of UWHC, and contacted Ms. Minihan to advise her of complainant's request for a personal leave and that complainant had brought to his attention during their meeting a potential complaint of sexual harassment.

10. On September 9, 1996, complainant met with Ms. Minihan. Complainant indicated to Ms. Minihan during their meeting that the harasser, whom she refused to name, had begun engaging in the objectionable conduct approximately three months

earlier; and that this conduct involved him hugging her so that he could feel her breasts, and patting her butt when she was bent over. Ms. Minihan and complainant discussed respondent's sexual harassment policy; and Ms. Minihan told complainant that the allegations she had presented were very serious, should be investigated, but couldn't be unless complainant disclosed the name of the alleged harasser. Complainant declined to do so. Complainant told Ms. Minihan during this meeting that, due to the sexual harassment to which she had been subjected, she didn't feel she could return to her job; that she needed a month off to look for another job; and that, after she found another job, she planned to resign, name the alleged harasser, and file a formal sexual harassment complaint. Based on this information, Ms. Minihan recommended to her supervisor Renae Bugge that complainant's leave request be granted. Ms. Bugge granted the request and designated a return-to-work date of October 7, 1996. Ms. Minihan also suggested during this meeting that complainant utilize the services of respondent's Employee Assistance Program (EAP). Complainant agreed to do this. Ms. Minihan set up an appointment for complainant with an EAP counselor for September 11, 1996. Complainant cancelled this appointment because she was scheduled for a job interview at that time. Complainant did not request or schedule another EAP appointment.

11. It was respondent's policy during the relevant time period that personal leaves of absence be granted only for exceptional reasons.

12. A meeting was scheduled to be held on October 7, 1996, at which complainant, Ms. Minihan, and Dianna Miller, complainant's union representative, were to discuss complainant's return to work. Complainant cancelled this meeting.

13. A meeting to discuss complainant's return to work was held on October 9, 1996. During this meeting, complainant was offered a second-shift custodial position but she did not accept it, stating that she didn't want to run into the alleged harasser during shift changes. Ms. Minihan advised complainant that respondent did not have the authority to offer her a position outside the University of Wisconsin Hospitals and Clinics. Ms. Miller, complainant's union representative, suggested transfer to a

position in the UWHC food service unit. Complainant agreed to this even though she indicated that she preferred custodial work, and Ms. Minihan agreed to investigate what food service positions were available. At this meeting, both Ms. Minihan and Ms. Miller encouraged complainant to reveal the identity of the alleged harasser so that her allegations could be investigated but she did not do so. Complainant did indicate during this meeting that the alleged harasser was a supervisor.

14. After this meeting, Ms. Minihan contacted the food service unit and arranged interviews for complainant for certain vacant positions there in counterpart pay ranges to complainant's Custodian 2 position. Ms. Minihan arranged to have complainant's candidacy handled on an expedited basis to reduce the amount of time she was on unpaid leave. As a result of these interviews, complainant was offered a Food Service Worker 2 position on the 4:55 a.m. to 1:25 p.m. shift by Mike Rentmeester. Mr. Rentmeester explained to complainant that she could start this job on October 21, 1996. Complainant told Mr. Rentmeester that she couldn't start until October 28, 1996, because she was scheduled to work another job. Mr. Rentmeester was surprised by this because he had been advised by Ms. Minihan to expedite the process in order to get complainant back to work as soon as possible.

15. Complainant was 5 minutes late for work on October 28, 1996. Respondent excused this tardiness. One part of the food service unit was approximately 30 feet away from Mr. Hyatt's work area, and the remainder was further away. Mr. Hyatt made no effort on or after October 28, 1996, to initiate contact with complainant. Complainant did not see Mr. Hyatt at work on October 28, 1996.

16. The next day that complainant was scheduled to work was October 30, 1996. Complainant called at the beginning of her shift to indicate that she would be late but she did not show up for work that day. Complainant did not call and did not show up for work on October 31, 1996.

17. Complainant worked her shift on November 1, 1996. Complainant did not see Mr. Hyatt at work on November 1, 1996.

18. At no time did complainant advise Ms. Minihan or anyone else at UWHC that she had seen Mr. Hyatt on her two days of work in the food service unit.

19. Complainant did not call and did not show up for work on November 2, 3, 5, 6, and 7, 1996. Mr. Hyatt would not have been at the work site during complainant's shift on Saturday, November 2, and Sunday, November 3, because he did not work between Friday at 7:00 a.m. and Sunday at 10:30 p.m., and complainant would have been aware of this fact. At hearing, complainant testified that she did not know why she failed to call in her absences to the food service unit.

20. As a result of these absences, Mr. Rentmeester, in a letter of November 12, 1996, notified complainant that she was directed to attend an investigatory meeting on November 13, 1996. Complainant did not show up for this meeting and had not notified respondent that she would not be appearing.

21. In a subsequent letter, Mr. Rentmeester notified complainant that an investigatory meeting had been scheduled to be conducted on November 18, 1996, to discuss the absences cited in the earlier letter as well as her additional "no call, no show" absences of November 8, 11, 12, and 13. In this letter, Mr. Rentmeester stated that, "Specifically, we wish to discuss the fact that since you began employment with us, you have only attended work on two of the thirteen scheduled work days."

22. Ms. Minihan scheduled a meeting for November 6, 1996, with complainant and Ms. Miller to discuss complainant's sexual harassment allegations. Complainant did not show up for the meeting and did not notify either Ms. Minihan or Ms. Miller that she would not be there.

23. Ms. Minihan scheduled a meeting for November 13, 1996, with complainant and Ms. Miller to discuss complainant's sexual harassment allegations. Complainant cancelled this meeting.

24. On November 18, 1996, complainant met with Ms. Minihan and Ms. Miller. At this meeting, she identified Mr. Hyatt as the alleged harasser and filed a formal complaint. In this complaint, complainant indicated that the harassment started two to four weeks after Mr. Hyatt had become her supervisor and continued until she

went on medical leave, and identified the acts of harassment as follows: on three occasions, once in the operating area and twice in the store room, he made noises or comments—these consisted of moaning when he saw her, commenting "what a nice view" when she was bent over, and saying "mm mm;" on one occasion, early in the morning in his office, he ogled her when she was wearing spandex shorts and a v-neck t-shirt; on two occasions, once in the smoking area and once in the hallway by the operating area, he hugged her; on three occasions, he slapped or patted her on the rear end; on at least one occasion, he got very close to her (within inches), tried to squeeze by her, and bumped into her—at the time, she didn't think he meant to do it; and, on one occasion, he asked her if she had a Wonder Bra on. The only individual named by complainant during her meetings with Ms. Minihan as someone who could corroborate her allegations was co-worker Aubrey Johnson. Complainant represented that she had told Aubrey Johnson that complainant had hugged her and rubbed against her. Complainant indicated to Ms. Minihan that co-worker Bob Manion had overheard an argument between complainant and Mr. Hyatt and had concluded they were joking. Complainant did not indicate to Ms. Minihan that Mr. Manion had witnessed any of the incidents of alleged harassment or that she had told him of them.

25. Complainant attended the scheduled investigatory meeting on November 18, 1996, with Mr. Rentmeester. Complainant offered no explanation for her absences. Complainant was suspended for one day without pay for her 11 no call, no show absences during her employment in the food service unit. During this meeting, complainant requested a change in her work schedule. Mr. Rentmeester granted this request, and, effective November 23, 1996, complainant was scheduled to work from 11:40 a.m. to 8:10 p.m. with varying days off each week.

26. On November 21, 1996, complainant told Mr. Rentmeester the revised schedule was "great" but that she was unable to take the new food service assignment because it was not the kind of work she wanted to do and because she was committed to another job for 10 hours a day until December 1, 1996.

27. On November 25, 1996, Ms. Minihan interviewed Mr. Hyatt. Mr. Hyatt denied that he had made the alleged noises or comments, that he had slapped or patted complainant's rear end, and or that he had gotten close to her or purposely bumped her; and indicated that he may have hugged complainant on those occasions when she was upset and crying about personal problems she was experiencing. Ms. Minihan directed Mr. Hyatt to stay away from complainant and not to retaliate against her in any way. Mr. Hyatt indicated that he had not seen complainant since she had gone on medical leave.

28. On November 26, 1996, Mr. Peck interviewed Aubrey Johnson. Ms. Minihan did not conduct this interview because her work schedule did not overlap with Mr. Johnson's but Mr. Peck's did. Mr. Johnson told Mr. Peck that it had been his impression that complainant hadn't liked Mr. Hyatt from "day one" because she felt that he had given her "shit jobs." The only thing that Aubrey Johnson related that complainant had indicated to him about Mr. Hyatt's conduct was that complainant had commented to him on one occasion that Mr. Hyatt "crowds" her.

29. On November 26, 1996, complainant called respondent and left a message on Ms. Minihan's voice mail requesting a personal leave of absence from November 26, 1996, until May 26, 1997. Consistent with respondent's policy that personal leaves of absence are granted only for exceptional reasons, this request was denied.

30. On December 2, 1996, Mr. Rentmeester directed two letters to complainant. In one of these letters, complainant was notified that an investigatory meeting had been scheduled for December 9, 1996, in relation to her no call, no show absences of November 15, 16, 17, 20, 21, 22, 25, 27, and 29 and December 2, 1996; and her no show absences (presumably, complainant called in before her shift to notify respondent she would be absent) of November 23 and 24, 1996. In the other letter, Mr. Rentmeester stated as follows, in relevant part:

> You have failed to report to work as scheduled and have verbally refused to accept the hours which were provided to you in acknowledgment of your special needs. Therefore, I am directing you to work as scheduled on December 6, 1996 at your original hours which are 4:55 AM to 1:25

> PM. Failure to report as scheduled may result in your termination from employment in the Food and Nutrition Services department at University of Wisconsin Hospital and Clinics.

31. On December 9, 1996, complainant called Ms. Minihan and advised her that she did not intend to attend the meeting scheduled by Mr. Rentmeester for that day because neither her attorney nor Ms. Miller was available to attend with her. It was respondent's usual practice to make a union steward available to an employee for an investigatory meeting and Ms. Minihan made this option available to complainant. Complainant refused this option. Ms. Miller is a field representative for the union, not a union steward. Ms. Minihan suggested that complainant discuss the matter with Ms. Bugge. Ms. Bugge advised complainant that her failure to attend the meeting could result in her termination. Complainant did not want a termination on her record, so she told Ms. Bugge that she wanted to resign. Ms. Bugge, consistent with respondent's practice, accepted complainant's verbal resignation, and confirmed this acceptance in a letter dated December 9, 1996. Complainant's conversations with Ms. Minihan and Ms. Bugge occurred prior to 9:00 a.m. on December 9, 1996.

32. At 4:41 p.m. on December 9, 1996, an attorney representing complainant initiated a FAX transmission to Ms. Minihan which stated as follows, in pertinent part:

> I write to you as legal counsel for Ms. McCartney and the Wisconsin State Employees Union. As you are already aware via a formal sexual harassment complaint filed by Ms. McCartney, she has been subjected to unwanted and severe sexual harassment by one of your supervisors, including unwanted touching and unwanted verbal statements.
>
> I write to advise you that as a result of this sexual harassment, Ms. McCartney is in the process of obtaining necessary and urgent mental health treatment. She is not currently able to work and will not be able to work for at least two weeks (December 23, 1996). I will contact you then with updated information concerning her condition and her ability to return to work.
>
> Please consider this letter a request for two weeks unpaid leave pursuant to the Wisconsin Family and Medical Leave Act, sex. 103.10 et seq. I am requesting pursuant to that law that no further discipline be

> imposed on Ms. McCartney for this absence. Ms. McCartney further reserves all her rights under applicable state and federal law to bring a claim for sexual harassment and any other claims supported by the facts.

33. Complainant had one visit with a mental health care provider. This visit occurred on December 16, 1996. The results of this visit were communicated in a letter to complainant's attorney dated December 19, 1996. In this letter, the psychologist indicated that complainant had reported during their visit that "the thought of going to the hospital fills her with anxiety and emotional pressure."

34. At no time prior to communicating her resignation to respondent did complainant advise respondent that her absences from the position in the food service unit were due to fear of seeing Mr. Hyatt at the work site, or to an aversion to the UWHC work site or any other mental health condition.

CONCLUSIONS OF LAW

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

2. Complainant has the burden to show that she was discriminated against or retaliated against as alleged.

3. Complainant has failed to sustain these burdens.

OPINION

The complainant's charge, as stated in her complaint, is as follows:

> Specifically, Complainant alleges that she was subject to unwanted and unsolicited sexual harassment by her supervisor, Dave Hyatt, and was terminated in retaliation for filing internal complaints regarding such harassment. Moreover, Complainant alleges she was constructively discharged from her employment in violation of the Wisconsin Fair Employment Act on or about December 9, 1996.

To prove discrimination/harassment under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of

articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

Section 111.32(13), Stats., defines sexual harassment as follows:

> "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. "Sexual harassment" includes conduct directed by a person at another person of the same or opposite gender. "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(1)(b), Stats., states as follows, in relevant part:

> Employment discrimination because of sex includes . . . any of the following actions by an employer . . . :
>
> (b) Engaging in sexual harassment; or implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term of 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 an employe, other than an employment decision that is disciplinary action against an employe for engaging in sexual harassment in violation of this paragraph; 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.

Section 111.36(3), Stats., states as follows, in relevant part:

> For purposes of sexual harassment claims under sub.(1)(b), an employer . . . is presumed liable for an act of sexual harassment by that employer . . . of 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.

The first question then is whether complainant has proved her claim of sexual harassment. A finding of sexual harassment would be consistent with a showing that the claimed incidents of harassment had occurred as alleged. In particular, repeated and unwelcome incidents of slapping or patting complainant's buttocks and of hugging or otherwise touching her, involve a type of conduct typically found to constitute sexual harassment. For example, in *Baskerville v. Culligan International Company*, 67 FEP Cases 564 (7th Cir. 1995), the court stated as follows in distinguishing actionable sexual harassment from mere workplace vulgarity:

> Drawing the line is not always easy. On the one side lie sexual assaults; **other physical contact, whether amorous or hostile, for which there is no 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 Savings Bank v. Vinson, 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). (Emphasis added)

However, the record here does not show that the claimed incidents occurred as alleged. Complainant has the burden of proof. Due to the fact that she presented no testimony or documentary evidence corroborating her portrayal of the allegedly harassing incidents, complainant's credibility and the plausibility of her version of

events becomes a necessary focus of the Commission's analysis. The following are examples of the problems the hearing record reveals in this regard:

1. At hearing, complainant testified that the incidents of alleged harassment occurred as frequently as two to three times a shift. This would translate to a frequency of eight to twelve incidents of harassment during a work week (complainant's and Mr. Hyatt's work schedules coincided on four out of five work shifts during a work week) and, given that complainant testified that this harassment occurred over a period of four to six weeks, to a total of thirty-two to seventy-two incidents. This sets forth a significantly different level of frequency than complainant communicated to Ms. Minihan during her investigation of complainant's allegations, i.e., a total of eleven incidents over this period of time. (See Finding of Fact 24, above).

2. At hearing, complainant testified that she had seen Mr. Hyatt on the two days that she had shown up for her job in the food service unit. This testimony is not credible. First, she never reported this to Ms. Minihan (or anyone else at UWHC) even though Ms. Minihan was in the process at the time of determining an appropriate job placement for complainant, and of reviewing complainant's request for a personal leave. In addition, complainant never offered her alleged sightings of Mr. Hyatt for her failure to show up for work in the food service unit even though she was facing termination.

3. At hearing, complainant testified that she realized in August (most of which she spent away from work recuperating from a work-related injury) that she was having mental health problems as a result of the alleged harassment; that these mental health problems were causing her to have a negative emotional reaction to entering the UWHC premises which prevented her from coming to work; that, due to these mental health problems, complainant attempted suicide in October; and that, as a result of the mental health symptoms she was experiencing, she contacted a mental health care provider but had to wait four to six weeks for an appointment which occurred in November of 1996. First, the only appointment with a mental health care provider indicated in the hearing record occurred on December 16, 1996, not in November of 1996. Second, four to six

weeks prior to December 16 would be early to mid-November. It does not seem reasonable for an individual with serious concerns about her mental health condition (beginning in August) to wait three months (until some time in November) before attempting to set up an appointment, or for a treating professional to wait four to six weeks before seeing a suicidal patient. Furthermore, complainant never reported the existence of her concerns about her mental health or her aversion to the UWHC work site to Ms. Minihan or anyone else at UWHC even during discussions of alternative work assignments and discipline for missing work; and complainant apparently didn't report this to her union representative since Ms. Miller was the one who suggested a position for complainant in the food service unit. It is concluded, as a result, that complainant's testimony that she failed to show up for work in the food service unit because of an aversion to the UWHC work site, is not credible. Even though the letter from complainant's mental health care provider (See Finding of Fact 33, above) alludes to this alleged aversion, it is important to note that this aversion was self-reported by complainant, and the visit with the provider did not occur until December 16, 1996, a week after complainant's resignation.

4. At hearing, complainant testified that co-worker Aubrey Johnson had witnessed Mr. Hyatt saying it was "a good view" when complainant was bent over on one occasion, and that complainant had told Mr. Johnson about another incident of harassment. However, unrebutted evidence in the record shows that Mr. Johnson told respondent's investigator only that complainant had told him on one occasion that Mr. Hyatt "crowds" her.

Complainant's effort to prove that she had been sexually harassed by Mr. Hyatt rests entirely on her description of the alleged incidents, first to Ms. Minihan (which is reflected in the record through complainant's testimony, Ms. Minihan's testimony, and Ms. Minihan's notes which were received as hearing exhibits), and then through complainant's account at hearing. There is no evidence in the record to otherwise corroborate this description, and the only information solicited from the one individual complainant claimed viewed an incident and was told of another failed to sustain

complainant's version of events. This, coupled with the above-cited deficiencies in complainant's credibility, leads to the conclusion that complainant has failed to sustain her burden of proving that she was sexually harassed as alleged.

It should be clarified here that the conclusion that complainant failed to sustain her burden of proving that she was sexually harassed as alleged rests in no part on respondent's contention that Mr. Hyatt "had every reason not to engage" in sexual harassing conduct because he was a married man. Respondent has failed to show any link between an individual's marital status and his or her tendency to engage in harassing behavior in the workplace.

Even if complainant had proved that she had been the victim of sexual harassment, respondent would not be liable for such harassment. The U. S. Supreme Court has recently issued two decisions setting forth the proper analysis of an employer's liability for sexual harassment committed by one of its supervisors. In *Burlington Industries, Inc. v. Ellerth,* 118 S.Ct. 2257, 77 FEP Cases 1 (June 26, 1998), and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 66 USLW 4643, 77 FEP Cases 14 (June 26, 1998), the Court held that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee," noting that supervisors are almost always aided in their misconduct by virtue of the authority their employer gives them. The Court went on to hold that, in a hostile environment case, such as the one here, an affirmative defense is available to the employer if no "tangible employment action" has been taken against the employee. Complainant, in her post-hearing briefs, does not appear to argue that such a tangible employment action was taken by her supervisor, and none is apparent. As a result, the inquiry necessarily focuses on whether the affirmative defense is available to respondent.

The Court in *Ellerth* and *Faragher* held that, when no tangible employment action was taken, the employer is vicariously liable for the supervisor's harassing conduct unless it can prove by a preponderance of the evidence that: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing

behavior; and (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Although an employer is not required to promulgate an anti-harassment policy with a complaint procedure, doing so, and enforcing it, may satisfy the first element of the affirmative defense. *Ellerth* and *Faragher, supra.* Although it is not disputed here that respondent had such a policy and procedure and that complainant was aware of it, complainant asserts that respondent did not carry out its obligations under this policy. Specifically, complainant alleges that respondent unreasonably delayed its investigation of the matter, and its remedial action after the conclusion of its investigation was inadequate.

Complainant's first argument in support of her delay contention is that Mr. Koroch, to whom complainant had reported the alleged harassment and purportedly given the name of the alleged harasser on August 30, 1996, was required by respondent's policy to personally and immediately initiate an investigation of complainant's allegations. It should first be noted that it was consistent with UWHC policy for Mr. Koroch to have referred the matter to Ms. Minihan in the human resources unit for investigation, as he did. The question then becomes one of determining whether complainant's alleged disclosure of Mr. Hyatt's name to Mr. Koroch on August 30, 1996, should be imputed to respondent; whether, as a result, respondent should have been expected to begin its active investigation of complainant's charge soon after that date; and whether respondent's failure to initiate an active investigation until November 18, 1996, constituted an unreasonable delay which would defeat the affirmative defense. In the record, complainant testified that she provided Mr. Hyatt's name to Mr. Koroch on August 30, 1996; Mr. Koroch was not called to testify; and Ms. Minihan testified that, consistent with UWHC policy, it would be expected that Mr. Koroch would have given Mr. Hyatt's name to Ms. Minihan if complainant had provided it to him. She also testified that complainant refused to provide the harasser's name during their September 9, 1996, meeting. First of all, it is

not likely that complainant would provide Mr. Hyatt's name to her second-level supervisor when, as she has claimed, she was afraid of retaliation at the work site, but not to Ms. Minihan, an employee of the human resources unit. It is also not likely that Mr. Koroch, a management employee, would withhold Mr. Hyatt's name from Ms. Minihan. It is concluded, as a result, that complainant has failed to prove that she provided Mr. Hyatt's name to Mr. Koroch, and has failed to demonstrate an unreasonable delay by respondent in investigating her charge.

Complainant further asserts that Ms. Minihan did not carry out a prompt investigation of complainant's allegations. In support, complainant argues that, even though complainant had not provided Mr. Hyatt's name to Ms. Minihan, complainant had disclosed in the meeting of October 9, 1996, that the alleged harasser was a supervisory employee and this information should have been sufficient to enable Ms. Minihan to start the investigation. However, respondent is not required to engage in guesswork in investigating a charge of sexual harassment, and complainant has cited no authority for imposing such a requirement. Ms. Minihan explained the confidentiality safeguards of respondent's complaint investigation procedure to complainant but complainant chose not to disclose the name of the alleged harasser until November 18, 1996. Again, it was complainant's actions which led to the delay and the record shows that, once complainant disclosed Mr. Hyatt's name to Ms. Minihan, an investigation was begun.

Complainant contends that respondent's investigation was inadequate. Complainant first appears to argue that the presence of Mr. Peck at Mr. Hyatt's investigatory interview was somehow inappropriate since he had a reputation as a stern disciplinarian. However, having a member of management participate in an investigation such as the one under consideration here is contemplated by respondent's anti-harassment policy and complaint procedure. In addition, if the results of the investigation showed that inappropriate conduct had occurred and disciplinary or other action was contemplated, it is certainly logical that management would be involved in

this decision and in its implementation. Complainant has provided no convincing reason why Mr. Peck's presence should be regarded as having tainted the investigation.

Complainant also argues that Ms. Minihan's failure to interview Mr. Manion rendered the investigation inadequate. However, the record shows that complainant only told Ms. Minihan that Mr. Manion had overheard an argument between her and Mr. Hyatt and had concluded that the two were joking. The record does not show that complainant had told Ms. Minihan that Mr. Manion had observed one of the incidents of alleged harassment or that she had told Mr. Manion about any of such incidents. The record shows not only that Ms. Minihan couldn't find an employee named Bob Manion and, as a result, abandoned efforts to interview him, but also that Ms. Minihan had no reason to believe, based on the information provided by complainant, that Mr. Manion could provide information to corroborate complainant's representations as to the incidents of alleged harassment. In view of this, Ms. Minihan's failure to locate and interview Mr. Manion did not render the investigation inadequate.

Finally, complainant argues that respondent's conclusion from the investigation that no incidents of sexual harassment of complainant by Mr. Hyatt had been demonstrated shows that respondent's investigation had been inadequate. However, the conclusion reached by Ms. Minihan was consistent with the information obtained during the investigation and, as concluded above, complainant has failed to show that the scope of the investigation or the process by which the investigation was conducted was inadequate.

The second element of the affirmative defense requires that an employer show that the complaining employee unreasonably failed to take advantage of any preventive or corrective measures or to avoid harm otherwise. The Court in *Faragher* and *Ellerth, supra,* indicated that the failure on the part of an employee to use an existing complaint procedure may suffice to satisfy the employer's burden under this element of the affirmative defense.

Here, there are two relevant time periods. The first is the time period during which complainant was on site performing her custodial position under Mr. Hyatt's

supervision. This is the time period during which she alleges the incidents of harassment occurred. In her testimony, complainant indicated that these incidents of harassment occurred over a period of four to six weeks, ending when she went on medical leave effective August 6, 1996. It is undisputed that, during this period of time, complainant failed to report this harassment to an individual at UWHC specified in respondent's anti-harassment policy as one of the proper individuals with whom a charge of harassment involving the alleged victim's supervisor should be filed. As a consequence, it must be concluded that complainant unreasonably failed to take advantage of corrective measures during this period of time.

The second relevant time period began when complainant returned to the work site in the food service unit after her medical and personal leaves. This time period began on October 28, 1996, which was the first day she was expected at the work site since she had begun her leaves effective August 6, 1996. In the period of time between August 6 and October 28, 1996, complainant had reported that she had been sexually harassed (although, as concluded above, she had not provided sufficient information to enable respondent to investigate this charge of harassment), and had requested certain corrective measures to address this harassment, i.e., a 30-day personal leave to look for a different job, and a position outside the custodial unit (her union representative suggested a position in the food service unit). Respondent approved each of these requested corrective measures. However, once she returned to the work site, complainant failed to show up for work or to call in her absences. The record shows that respondent provided multiple opportunities for complainant to explain or correct these deficiencies but she failed to do either. These failures by complainant led to her separation from employment with respondent. Complainant did not provide respondent with the identity of the alleged harasser until November 18, 1996. Once respondent had this information, it conducted an appropriate investigation. Complainant never returned to the workplace after November 18, 1996, and obviously she does not allege any harassment by Mr. Hyatt after this date. It is concluded as a result that

complainant unreasonably failed to take advantage of preventive and corrective measures provided by respondent.

Complainant contends in response that the aversion she developed to respondent's work premises resulting from the alleged sexual harassment prevented her from taking advantage of the corrective measure provided by respondent of transfer to a position in the food service unit. There are several problems with this contention. First, complainant has failed to show that she was the victim of sexual harassment. Second, as concluded above, her representations as to her sightings of Mr. Hyatt and as to the aversion she developed, are not credible. Complainant argues that, "No consideration was given to McCartney's objections to the position nor to her concerns regarding seeing Hyatt." (Complainant's post-hearing brief at p. 16). However, the record shows that transfer outside the custodial unit was requested by complainant and that transfer to the food service unit was suggested by complainant through her union representative, that the only concern with the food service unit position which she may have stated related to her preference for custodial work, and that she never advised anyone at UWHC that she had seen Mr. Hyatt during the two days she had shown up for work in the food service unit.

The issue of liability for sexual harassment is also addressed in §111.36(3), Stats., which is quoted above. Under this statutory provision, a presumption of liability attaches if the complainant informs her employer of the harassment and if the employer fails to take appropriate action within a reasonable time. Here, as concluded above, the record shows that complainant did not effectively provide notice of the harassment to her employer until she disclosed the name of the alleged harasser on November 18, 1996, and that respondent took appropriate action within a reasonable time after that date. As a result, it is concluded that complainant has failed to show that the presumption of liability under §111.36(3), Stats., should apply here.

It is concluded that complainant has failed to show that the presumption of liability under §111.36(3), Stats., should apply here; and that respondent has proved each of the elements of the affirmative defense set forth in *Ellerth* and *Faragher*, and

that complainant has failed to successfully rebut this proof. As a consequence, even if complainant had shown that she was the victim of sexual harassment by Mr. Hyatt, respondent has shown that it would not be liable for such harassment.

Finally, complainant asserts that her resignation from employment with respondent constituted a constructive discharge, and was in retaliation for filing a charge of sexual harassment with respondent.

To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action.

Complainant first argues that she was retaliated against by Mr. Hyatt, after she objected to his alleged harassment, when he began to assign her undesirable duties that did not fall within the scope of her position description. Complainant testified that she objected to Mr. Hyatt's alleged harassment by becoming "short" with him and engaging in an argument with him. The Fair Employment Act requires that an individual engage in certain types of activities in order to be protected from retaliation. §§111.322(2m) and (3), Stats. Complainant has failed to show that being "short" with Mr. Hyatt or arguing with him meets this requirement. Even if it were assumed for purposes of analysis that complainant had shown that she had engaged in a protected activity, the record here does not show that complainant was assigned job duties outside the scope of her position. In her testimony and in her argument, complainant failed to specify what these allegedly undesirable duties consisted of; and the duties which she indicated in her hearing testimony that she was assigned to carry out appear to be reasonably related to custodial responsibilities in a medical setting.

Complainant also contends that her termination resulted from retaliation. However, her termination was the result of her resignation, and complainant resigned rather than attending a pre-disciplinary meeting scheduled by Mr. Rentmeester to

address complainant's frequent no-call, no-show absences. It is important to note that Mr. Rentmeester, who was pursuing discipline against complainant and who had scheduled the meeting, was not shown in the record to have been aware of, nor to have any reason to have been aware of, complainant's charge of sexual harassment. Although complainant objected to the meeting based on the unavailability of union representative Miller, the record indicates that complainant waited until the last minute to assert this objection and respondent, consistent with its usual practice, offered her the assistance of an available union steward. Also consistent with usual practice, Ms. Bugge explained to complainant that her failure to appear at the meeting could result in termination. The record shows that complainant's separation from employment resulted directly and solely from her failure to show up for work, to call in her absences, to offer an explanation for her absences, or to appear at the last pre-disciplinary meeting. This is not retaliation. Complainant attempts to link her attendance problems to an alleged mental health condition resulting from the alleged sexual harassment. As concluded above, given the evidence of record, this is not credible.

Complainant's theory of constructive discharge appears to be intertwined with her allegation of retaliation, i.e., her resignation was actually a constructive discharge which resulted from retaliation for her having filed a charge of sexual harassment with respondent. Complainant would have to prove the existence of intolerable working conditions to sustain a showing of a constructive discharge. *See, e.g., Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97; *Goss v. Exxon Office Systems,* 747 F.2d 344, 36 FEP Cases 345, 346 (3d Cir. 1984). Complainant's theory in this regard is that Mr. Hyatt's sexual harassment of her resulted in a fearful aversion on her part to respondent's work premises which rendered her working conditions in the food service unit intolerable. Once again, this theory relies on elements which complainant has failed to prove, i.e., she has failed to prove that she was sexually harassed by Mr. Hyatt, that she had sighted Mr. Hyatt on the two days that she showed up for work in the food service unit, or that this sexual harassment and sightings resulted in a fearful aversion to

respondent's work premises. Complainant has failed to show that she was constructively discharged.

ORDER

This complaint is dismissed.

Dated: March 24, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM
960165Cdec1

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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