

STATE OF WISCONSIN

PERSONNEL COMMISSION

JONATHAN HECHT,
Complainant,

v.

**Chief Executive Officer, UNIVERSITY OF
WISCONSIN HOSPITALS AND CLINICS
AUTHORITY.**
Respondent.

**FINAL DECISION AND
ORDER**

Case No. 97-0009-PC-ER

The Commission reviewed the proposed decision and order. In issuing this final decision, the Commission changed the discussion of the first hearing issue in the Opinion section of the proposed decision and order. The change was made to clarify the legal analysis.

A hearing was held on the above-noted case on December 9-10, 1998, with closing oral arguments on December 17, 1998.

The parties agreed to the following statement of the issues for hearing at a prehearing conference held on August 5, 1998 (see Conference Report dated 8/12/98):

1. Whether complainant was sexually harassed in conjunction with the following incidents in 1996:
 - a) Reimer sitting on Weier's lap and Weier sitting on Reimer's lap near and in the PMC work area in March or April 1996.
 - b) A co-employee placing copies of derogatory, sexist e-mail messages written by co-employees in complainant's work storage area in June¹ 1996.
 - c) The use of e-mail for sexist messages by complainant's co-employees.
 - d) Anti-male comments made by co-employees such as "men are idiots" and "men are morons" from February 1995 to August 1996.
 - e) Comment by co-employee that "men are pigs" in November 1996.
 - f) The use of e-mail by complainant's co-employees for non-business purposes.

¹ Issue "1b" as initially framed contained the date of May 1996. Complainant agreed at hearing that the correct date was June 1996.

- g) The organization and planning of "girls night out" during business hours.
2. Whether complainant was discriminated against on the basis of sex when respondent failed to follow its Internal Complaint Procedure with respect to its investigation of complainant's harassment complaint in 1996.
3. Whether complainant was discriminated against on the basis of sex when he was not offered employment in the First Shift Supervisor position in 1996.
4. Whether complainant was retaliated against by respondent for engaging in fair employment activities when complainant was not hired for the First Shift Supervisor position in 1996.

FINDINGS OF FACT

1. Complainant worked for respondent's Communication Center, first as a limited term employe (LTE), then as a project employe. In March 1995, respondent hired him as a permanent employe in the Communication Center in a Program Assistant 1 (PA1) position. In March 1996, complainant's position (and all permanent PA 1 positions) was reclassified to the PA2 level.

2. The Communications Center operates 24 hours a day, 7 days a week. The complainant worked in the section responsible for telephone and paging services for the public, patients, physicians and nurses.

3. When complainant was hired Ms. Arbutus Kjentvent was the first-shift supervisor (hereafter, Sup Kjentvent) and complainant's first-line supervisor. Mr. Burrell DeClute (hereafter, Manager DeClute) served as department manager. Sup Kjentvent reported to Manager DeClute. Both individuals reported to the Assistant Director, Ruth Fankhauser (hereafter, AD Fankhauser).

4. Initially, the staff in the Communications Center was comprised of about half males and half females. By the summer of 1996, the first shift was comprised of about 9 females and complainant who is a male. (Manager DeClute left his position in March 1996.)

E-Mail "Poems"

5. On April 22, 1996, Cindy Chesney, one of complainant's co-workers, was upset with complainant. The specific reason why Ms. Chesney was angry this time at complainant is not explained in the record. In any event, on April 22, 1996, Ms. Chesney sent an unflattering poem about complainant by e-mail to at least one female co-worker, Kristi Yerges. Ms. Yerges responded on the same date with her own poem (Exh. C-2, p. 2) listing the "subject" as "Another Poem About our Lover." Ms. Yerges' poem is shown below (read first column, then read second column):

Poinsettias are red. Jon has a bald head.	Flower stems are green. I hate it when he leans (over the desk).
They can also be white. He sure gets uptight.	They are also jade. He loves to rollerblade.
Carnations can be lime. He loves to bitch about overtime.	Tulips can be turquoise. He has one loud voice.
Daisies are yellow. He's one gross fellow.	Roses are pink. Sometimes he stinks.

Now - it's your turn to add some more.

6. On April 23, 1996, Erin Gordinier, another of complainant's co-workers who evidently had received a copy of the e-mail described in the prior paragraph, wrote her own poem about complainant listing the "subject" as "Another Poem about Our Lover." She sent a copy of her e-mail to Kristi Yerges, Cindi Chesney and another co-worker, Jennifer McBee. Ms. Gordinier's e-mail is shown below (Exh. C-2, p. 3):

Jon is special in many ways . . .
His teeth have a kind of yellow haze.

His hair is black and frilly . . .
Similar to the hair on his little willy.

He sheds on the desk nearly every hour . . .
Making small nests and smelling very sour.

He loves to yell and be in control . . .
He needs to chill and maybe smoke a bowl.

He loves to stretch and let out small groans . . .
But he's a very serious man (sic) it comes to answering those phones!

To know him is to hate him, and we all certainly do . . .
Let's just stick together and try not to hear him chew!

7. On April 26, 1996, between 1:20 and 1:30 p.m., Ms. Chesney sent an e-mail copy of her poem and of Ms. Gordinier's poems to another female co-worker, Jodi McBee (sister of Jennifer McBee). On April 26, 1996, at 2:03 p.m., Jodi McBee sent her own poem by e-mail to female co-workers Kristi Yerges, Mignon Coyne, Cindi Chesney, Erin Gordinier, and Beth Reimer (Exh. C-2, p. 1). The text of Ms. McBee's e-mail was sent under the "subject" of "Our Hero" and is shown below:

His long black pubics sticking straight out
The fucker'd look better bald without any doubt

His big yellow buckers scare me to death
But what's even worse is that raunchy ass breath

His dirty jeans hang down to almost reveal his crack
And his shirt goes up to show the hair on his back

He'll tell constantly that he lost forty pounds
Yah right, ya big loser, let's go a few rounds.

8. The females noted above as having received or written the e-mail poems deleted them from their work computers. Ms. Reimer sent a copy of the poems to her boyfriend's student e-mail address. Her boyfriend was Dan Weier. Some time after the poems were written and before June 15, 1996, he started working at the Communications Center on the second shift.

9. An unknown person or persons placed a copy of the e-mail poems in complainant's storage box where he discovered them upon arriving at work on Saturday, June 15, 1996. Jennifer McBee noticed that complainant's face was red and that he appeared

upset. She asked him what was wrong. In response, he laid out the e-mail messages. She had forgotten about them. She had never intended for complainant to see the poems because she knew they were hurtful. She apologized to complainant. Ms. McBee used a work telephone to call Sup Kjvent at home at about 6:45 a.m. Ms. McBee was crying and upset during the call. Ms. McBee told Sup Kjvent that some co-workers had written "poems" about complainant, that the content was "very bad" and that someone had placed the poems in his storage box. Sup Kjvent telephoned complainant at work to see if he was okay, if he wanted to go home, or if he wanted her to come in to work. He said he was okay and chose to remain at work, including working overtime. He further indicated that everyone involved who was at work that day already had apologized to him. Sup Kjvent called complainant at work later in the day to confirm that he still wanted to work the overtime. He said he did.

10. On Sunday, June 16, 1996, Sup Kjvent telephoned AD Fankhauser at her home and told her what had occurred. They decided they wanted to investigate the incident and to meet with staff from respondent's Department of Human Resources (HR) for guidance.

11. On Monday, June 17, 1996, Sup Kjvent was at work and contacted Sue Minihan, who works in respondent's HR. They agreed to meet at 9:00 a.m. the same day. The meeting occurred with Sup Kjvent, AD Fankhauser and Sue Minihan attending. Megan Johns (a labor relations person in HR) also may have attended this meeting. A decision was made that AD Fankhauser and Sup Kjvent would conduct a formal investigation to determine whether a work rule was violated. These individuals did not have copies of the e-mail poems when they met. If Ms. Minihan had known at this meeting that the poems contained a sexual component, she would have conferred with HR Director, Renae Bugge, to see if HR should do the investigation.

12. Complainant was scheduled off work on Monday. The investigation began on Tuesday morning (June 18, 1996) when Sup Kjvent and AD Fankhauser met with complainant. Complainant brought the poems that were left in his storage box. He also had the e-mail "headers" and "footers" (p. 4, Exh. C-2) that Jody McBee found in a wastebasket. The headers and footers indicated the poems had been printed off Mr. Weier's student e-mail. This was the first time Sup Kjvent and AD Fankhauser saw the poems. AD Fankhauser

was concerned about the hurtful nature of the poems and the potential resulting impact on complainant. She asked complainant whether he was okay. He indicated he was and that everyone involved had apologized to him except Ms. Reimer and Mr. Weier. Complainant said he knew about respondent's harassment policy and he felt the e-mail poems violated the policy. He said he wanted Ms. Reimer fired because of her history of being mean to co-workers and because he thought she placed the poems in his storage box. AD Fankhauser replied that the investigation was underway but she could not guarantee any specific results. She told complainant that the Employee Assistance Program (EAP) was available if he needed additional support.

13. In the afternoon on Tuesday, June 18, 1996, AD Fankhauser and Sup Kjentvent went to Ms. Minihan's office and showed her the e-mail poems. Ms. Minihan recalls that both supervisors were "horrified" about the content of the poems. Ms. Bugge, and perhaps Ms. Johns, joined the impromptu meeting. A decision was made to let the supervisors continue with the investigation because interviews already had been conducted with the McBee sisters.

14. Sup Kjentvent and AD Fankhauser conducted an investigative interview with Jodi McBee on June 18, 1996. (AD Fankhauser's notes of this interview are in the record as Exh. R-104, p.6). They interviewed Ms. Reimer, Mr. Weier, Ms. Chesney, Ms. Coyne and Jennifer McBee on June 19, 1996. (AD Fankhauser's notes of these interviews are in the record as Exh. R-104, pp. 1-5). Sup Kjentvent interviewed Erin Gordinier and Kristi Yerges on June 20, 1996. (Sup Kjentvent's notes of these interviews are in the record as Exh. R-105.) The general explanation was that the poems started as a joke, got out of hand and were never meant for complainant's eyes. Mr. Weier denied any knowledge of the poems. Apparently in response to the fact that the poems given to complainant had been printed off his e-mail, Mr. Weier suggested Ms. Reimer could have done this because she knew his e-mail password. Ms. Reimer denied printing the poems given to complainant and suggested that Mr. Weier brought the poems into work. All individuals interviewed denied knowing who placed the poems in complainant's storage box.

15. AD Fankhauser and Sup Kjentvent met with Ms. Minihan and Ms. Bugge on June 25, 1996, to report the results of their investigation. AD Fankhauser felt Ms. Reimer

was the person who put the poems in complainant's storage box and would have terminated her if sufficient proof existed. Ms. Bugge suggested that additional efforts be made to see if proof could be uncovered as to whether Ms. Reimer or Mr. Weier had shared the poems with complainant. AD Fankhauser agreed to see if there was some technical way to determine this. AD Fankhauser and Sup Kjvent also agreed to speak again to Ms. Reimer and Mr. Weier.

16. AD Fankhauser was unable to identify a technical way to determine more about who printed the e-mail poems. The second investigative interviews with Ms. Reimer and Mr. Weier provided no further clarification of their roles in the incident.

17. AD Fankhauser, Sup Kjvent and HR met to discuss what level of discipline should be imposed. The HR staff present included Ms. Bugge and Ms. Minihan and, perhaps, Ms. Johns. HR initially felt those who wrote the poems should be given a written reprimand and those who read them should receive a verbal warning. The level of discipline to impose for Ms. Reimer and Mr. Weier was more difficult due to the lack of proof as to which person had placed the poems in complainant's storage box. HR's initial feeling was that Ms. Reimer and Mr. Weier should receive oral reprimands due to the lack of proof. Ultimately, the HR staff agreed to support oral reprimands for all staff involved in the e-mail poems.

18. Everyone who was interviewed as part of the investigation received an oral reprimand during the first week in July 1996. The individuals who wrote the poems received a reprimand for writing them. The individuals who read or circulated the poems received a reprimand for their actions. The basis for Mr. Weier's reprimand was that he shared his e-mail password with Ms. Reimer. Each of these employees received a copy of respondent's sexual harassment policy when discipline was imposed. Each employee was warned that more severe discipline could be imposed for a similar additional violation. Each employee was told that AD Fankhauser could go without warning into their e-mail to ensure that they stopped misusing the system. She had gone into their e-mail prior to the investigation in a fruitless search for saved poems about complainant. She did access their e-mails (or had someone else do so at her direction) 3-5 times after discipline was imposed and found no offensive materials. At a staff meeting held (mid-July 1996) after discipline was imposed, AD Fankhauser went

over the proper use of e-mail. No further poems were written about complainant to respondent's knowledge.

19. Complainant requested a meeting in late July 1996, with AD Fankhauser. The investigation had been completed and he knew Ms. Reimer had not been fired. He wanted to know the details of the investigation and the names of the HR staff who were consulted in relation to the investigation. AD Fankhauser replied that she could not give the requested details but would give him the names of the HR staff involved. Four months later, complainant sent an e-mail message to AD Fankhauser to renew his request for the identity of the involved HR staff. At this point she declined to comply saying incorrectly that the requested information was confidential. Complainant copied the HR department on at least one of these e-mail exchanges. (Exh. C-58)

Remaining Allegations of Sex Harassment

20. Sometime after April 1996, Mr. Weier came to work early for his second shift. His girlfriend, Ms. Reimer was working the first shift. Ms. Reimer entered the break room. There was no chair for her to use so she sat on Mr. Weier's lap. A co-worker reported this to Sup Kjvent. Sup Kjvent held a meeting with Mr. Weier and Ms. Reimer, which also was attended by the second-shift supervisor. Sup Kjvent advised Mr. Weier and Ms. Reimer that such conduct was inappropriate in the work place and could be viewed as a work-rule violation. Sup Kjvent decided to counsel these employees rather than impose formal discipline because it was unclear on the face of the work rules that such conduct could be viewed as violating the work rules. As far as Sup Kjvent knew, this type of behavior did not reoccur and, therefore, the counseling was adequate to stop the objectionable behavior. In fact, however, about 2 or 3 days after the break room incident, complainant saw Mr. Weier sitting in Ms. Reimer's lap at her desk. Complainant did not report this conduct to management and was unaware of anyone who did.

21. Some employees in the Communications Center continued to receive e-mail of a sexual nature after July 1996 (after the oral reprimands were imposed on employees involved with the e-mail poems). Any objectionable messages received by the employees were deleted

prior to AD Fankhauser's random checks of the e-mail. Complainant did not receive any sexually objectionable material by e-mail. Sometime after July 1996 (after the co-workers involved in the e-mail poems were disciplined), complainant went to Sup Kjvent and reported that jokes were still passed around on e-mail. Sup Kjvent asked what his allegation was based upon and he replied that Jenny Ashbacker flipped her computer screen off when complainant walked by. Sup Kjvent told complainant she needed more evidence than this but he never returned with more evidence. In response to complainant's concern, Sup Kjvent asked AD Fankhauser to check Ms. Ashbacker's e-mail. AD Fankhauser had Ms. Ashbacker's e-mail checked and no objectionable material was found. Complainant attached a copy of what he perceived to be objectionable e-mail (Exh. C-3) to the complaint he filed with the Commission. The e-mail in this exhibit is dated in May 1997. He went out of his way, however, to search for objectionable e-mail on a co-worker's e-mail system and this is how he found the documents in Exh. C-3.

22. Inappropriate comments were made about both sexes in the Communications Center from February 1995 to August 1996. Complainant contributed to this atmosphere when he was talking about a 15-year old waitress he "hit on" at Pasquales (a restaurant), a discussion that Jennifer McBee found "appalling." Complainant gave the examples that he heard Rachel Welchert, a co-worker, say "men are idiots," "men are morons," and "men are so hard to train." He said she was having a lot of problems with her marriage and vented by using these comments. Neither complainant nor any of his co-workers complained to management that the comments were made. Sup Kjvent did not hear the comments: "men are idiots", "men are morons" or "men are so hard to train."

23. Even though no one complained, Sup Kjvent attempted to curb inappropriate comments by making her presence known in the area, by redirecting conversations and by bringing the employe involved into her office to inform them that such comments were inappropriate. She did not take corrective action each and every time she heard an objectionable comment. Since no one complained to her about the comments, she had no

reason to believe that her remedial efforts were inadequate.² Sup Kjentvent worked at her desk about 95% of the time. Her desk was close to the area where the subordinates worked and it was easy to hear everyone speak. There were multiple times during the day that she would be at her desk but unable to hear comments because a subordinate was in her office discussing a work problem.

24. Early in a morning during November 1996, Jennifer McBee complained to a co-worker, Mignon Coyne, that Ms. McBee had to pick up all the time after her boyfriend and Ms. Coyne responded "Men are pigs." Sup Kjentvent overheard this comment but took no action. On a different date, Sup Kjentvent overheard Ms. Coyne repeat the comment, but Sup Kjentvent did not hear the context in which the comment was made. Sup Kjentvent spoke with Ms. Coyne and told her this was inappropriate and she could not speak this way at work. Complainant heard Ms. Coyne say this phrase three-four times a week prior to his receipt of the e-mail poems in June 1996. He heard Jenny Ashbacker say "that pig" in reference to a dispute between Woody Allen and Mia Farrow. He heard the same co-worker say "that pig" in reference to an article in the newspaper regarding OJ Simpson. The only time negative comments about men were directed at complainant was on one occasion when Ms. Coyne said directly to complainant (context unknown) "I don't care what you think, men are pigs."³ Complainant did not report any of these comments to management because he thought Sup Kjentvent overheard most of the comments and he erroneously concluded that she failed to take any corrective action.⁴ These comments lessened significantly in frequency after 1996. Complainant overheard only one similar comment that occurred about one year prior to the hearing.⁵

25. Many people in the Communications Center socialized after work. Some gatherings included both sexes, some included only women and some (fewer) included just men. These gatherings were organized, including by complainant, on work time but not to the

² The Commission moved this statement from the Opinion section.

³ The Commission changed this sentence to clarify that only one negative comment about men was directed at complainant.

⁴ The Commission changed this sentence to clarify the intended meaning.

⁵ The final two sentences were added to better reflect the information in the record.

extent that they interfered with the work being done.' Ms. Coyne made a point of letting "everyone" in the unit know when only the women were going out and complainant felt she did this on purpose to make him feel excluded. Complainant never told management that he felt excluded by women having gatherings after work.

Failure to Follow Policy?

26. Respondent has a policy and procedure covering discrimination and harassment. The policy in effect in June 1996 is in the record as Exh. C-26. Excerpts are shown below:

II. Policy

- A. The Discrimination Complaint Procedure provides an expedited review of complaints by the UWHC Harassment Contact Persons and seeks to resolve complaints to the satisfaction of the employee. This procedure is designed to encourage an internal route of resolution.
 - 1. Both formal and informal complaint processes are available.
 - a. The informal process uses Harassment Contact Persons to discuss a concern, provide information, or internally review/resolve a complaint.
 - b. The formal process involves signing a Complaint Form which must contain a detailed description of the conduct being complained about, the name of the alleged offender, and the name of the person filing the complaint . . .

III. Discrimination Complaint Procedure

- A. Employees who believe they may have been the subject of discrimination or harassment may raise their complaint with their supervisor . . . , the next level of management, or with a Harassment Contact Person (HCP). If an employee informs a supervisor that he/she is the subject of harassment or discrimination, the supervisor will promptly consult with their Department Manager and the Human Resources Department to resolve the matter.
- B. In consultation with the supervisor HCP will conduct a review of the allegations in order to clarify the nature of the complaint, and understand the relief desired by the employee . . . Before initiating a review of the allegations, the HCP will discuss the University's confidentiality and non-retaliation policies with the employee.
- C. The HCP will consult with the appropriate Department Manager . . . in the resolution of the complaint. Recommendations to prevent future recurrences will be discussed as necessary.

- D. After the review has been completed, the HCP will notify the employee of the Hospital's response to the employee's complaint . . .
- E. Notes related to the informal investigation will not be kept in an employee's personnel file.
 - 1. Filing a formal written complaint may result in the following types of possible disciplinary action:
 - a. Disciplinary action may be recommended or imposed upon the alleged offender. Disciplinary action may include a written reprimand placed in the alleged offender's employment or academic file; a disciplinary transfer to another job location; a loss of merit pay; employment or academic suspension; discharge or expulsion, or other appropriate action . . .

III. Hospital Harassment Contact Persons

Rena Bugge 263-6500 . . .
Sue Minihan 363-9092

27. Complainant did not initiate a sexual harassment complaint under respondent's . . . policy. Rather, his supervisors initiated contact with him. The two items under the policy which respondent did not follow in its investigation of the e-mail poems included discussing respondent's confidentiality and non-retaliation policies with complainant before starting an investigation (item III.B), as well as notifying the complainant that all co-workers involved received a verbal reprimand (item III.D). No one provided complainant with a copy of respondent's harassment policy, but he got a copy from his work computer 10-14 days after he received the e-mail poems.

28. Sara Mattson, one of complainant's co-workers, alleged that Manager DeClute treated her differently than males in the Communication Center. This was at a time prior to the e-mail poems when there were more males working in the center. She initially reported her concerns to Sup Kjvent who advised her to speak with AD Fankhauser as Manager DeClute's supervisor. Respondent's HR Department investigated Ms. Mattson's concerns. Ms. Mattson felt Manager DeClute was more open to suggestions from males (including complainant's suggestions), that Manager DeClute assigned females to cleaning tasks but not males, and that Manager DeClute treated her unfavorably in other ways. She wrote her concerns down (Exh. C-48) but there is no evidence in the record how this came about. After the investigation, AD Fankhauser and Sue Minihan (HR) spoke to Manager DeClute about Ms.

Mattson's concerns, age differences, communication style and comments that could be interpreted as offensive. Respondent counseled Manager DeClute but imposed no discipline. There is no evidence in the record that respondent discussed with Ms. Mattson its confidentiality and non-retaliation policies or that respondent ever informed Ms. Mattson that Mr. DeClute was counseled but received no discipline.

First Shift Supervisor Vacancy

29. In March 1996, Manager DeClute left his position. The vacant position was posted. Complainant and Sup Kjvent were among the candidates who applied for the position. Sup Kjvent was hired for the manager position in August 1996. This left the first shift supervisor position vacant for three months. During these three months all staff shared in the extra work created by the vacant position, such as answering inquiries that previously were handled by the first shift supervisor. Complainant may have answered more of these inquiries due to his personal relationship with some of the customers, and to the fact that he had worked in the center longer than most of his co-workers and, accordingly, had more knowledge. He also answered his co-worker's questions about calls, which previously had been handled by the first shift supervisor. He took tasks upon himself when he saw that a need existed such as a call change usually done by the second shift supervisor (Exh. C-18) and renewing the schedule of events usually done by the first shift supervisor (Exh. C-19). Manager Kjvent and the second shift supervisor, Carol Gregg, shared the core supervisory duties (hiring, firing, evaluating subordinates, etc.).

30. The first shift supervisor vacancy was announced in the newspaper. The text of the announcement is shown below (Exh. C-27):

UW Hospitals & Clinics: Telecommunications. Provide first-line supervision of UWHC Communication Center staff and provide program assistance to Call Center manager. This position will be responsible for development of operating policies and procedures, staff hiring, scheduling, training and evaluation of employees. Additional responsibilities include overseeing assisted patient scheduling for the Clinics. This is a 24-hour per day, 365-day per year operation providing paging and message services for UWHC.

Well qualified candidates will have previous experience as a first-line supervisor or in a leadworker role. Knowledge of telephone and paging skills and protocols, as well as excellent oral and written communication skills are essential. Knowledge of medical terminology is desired.

Apply with resume and cover letter detailing your qualifications to Barb Paltz; UWHC; HR Department . . . (by) October 11, 1996.

31. Complainant asked AD Fankhauser to let him know when the first shift supervisor position would be posted. She honored this request. (Exh. C-33)

32. The newspaper advertisement for the first shift supervisor position was drafted by Barbara Paltz. AD Fankhauser and Manager Kjentvent reviewed the draft and provided feedback. The term "lead worker" was included because some lead workers in the private sector have the responsibility to hire, fire and/or evaluate subordinates.

33. On October 16-18, 1996, Barbara Paltz (HR) did the initial interviews for the eight individuals who applied for the first shift supervisor position. Four candidates, 2 male and 2 female, worked in the Communications Center. She did not "pass" any of the four internal candidates on to the next step in the hiring process. She did not pass complainant to a second interview because his supervisory experience occurred more than 10 years prior to the interview and was gained in a warehouse setting as opposed to a call-center or medical setting and because the scope of his supervisory experience was not as "deep" as respondent desired. Ms. Paltz also remembered that complainant discussed his work at the Communications Center during the interview. She did not recall that he mentioned having supervisory experience at the Communications Center. At this time, she was unaware of the incident involving the e-mail poems about complainant.

34. Ms. Paltz was unable at hearing to recall many details related to complainant's interview. This was due in great part to the fact that respondent lost the hiring file kept by Ms. Paltz and, accordingly, her interview notes were unavailable at hearing.⁶ Respondent had the file in February 1997, when Ms. Johns telephoned Ms. Paltz at home. Ms. Paltz was on

⁶ The application and hiring documents relating to the three candidates passed on to Manager Kjentvent for interview are in the record (Exhs. C-39, C-40 & C-41). These were Manager Kjentvent's copy of the documents which she retained.

maternity leave at the time and told Ms. Johns where the hiring file was. The HR office moved some time between February 1997 and respondent's discovery that the file was lost. Other important documents unrelated to this case also were lost.

35. The interview questions asked by Ms. Paltz were related to the first shift supervisor job. The questions are shown below (Exh. C-39, pp. 1-3):

1. Briefly describe your background, particularly your supervisory or telecommunications experience. What was your latitude for decision making?
2. Experience: What were your favorite positions? Least favorite? Why?
3. What type of work interests you most? What is your ideal job? What interests you about working in a medical setting? About this position in general?
4. Why are you interested in leaving your current position?
5. What do you do well (work-related)?
6. What do you find difficult to do (work-related)?
7. Tell me about a time you were given a project to do that you knew little or nothing about at the onset. How did you begin the project? What did you do to gather information? Where did you go for guidance/assistance?
8. What is your experience in customer service?
9. Please tell me of a time when you encountered a person in a work setting who was very difficult to handle - can be a customer, co-worker, or supervisor. What happened? How did you handle it? What was the resolution?
10. Describe a time when you felt pressure on the job. How did you handle it?
11. What would your past supervisors say about your performance?
12. The rate of pay for this position is approximately \$24,099 per year for at least the first six months. How does this amount compare to: your current or past salary? Your salary expectations or requirements for this position? Other positions for which you have applied?
13. When are you available to begin work?
14. Is there any other information about you I should know when considering you for this position?
15. May we check your references? (Complete reference sheet and turn it in to Reception Desk.)

36. Complainant's own description of his "supervisory" experience supports Ms. Paltz's testimony. Complainant's warehouse work (from 1980-86) on some levels presented more complex management tasks than undertaken by the first shift supervisor position due to

the warehouse government contracting, contract bidding and dealing with government inspectors. Complainant had no responsibility in the warehouse job for hiring or evaluating employee work performance. He could make firing recommendations but did not have the final authority to fire. Complainant's work in the Communications Center did not include responsibility for hiring, firing or evaluating co-worker's work performance.

37. Ms. Paltz forwarded the names and application packets of three candidates to Manager Kjentvent for consideration in the second stage of the hiring process. All three candidates were females who had full supervisory responsibility in a medical and/or telephone call center. Ms. Paltz did not give Manger Kjentvent the names of applicants who were eliminated from further competition. During the week of October 25, 1996, Manager Kjentvent interviewed the three candidates and the second shift supervisor sat in on the interviews. Manager Kjentvent was aware that complainant and two of his co-workers may have applied for the job but she did not think any of them had prior supervisory experience and, accordingly, was not surprised that they did not proceed to the second interview. Maria Traino was hired. She left the position after being there only 8 weeks to accept a better-paying position with a health club.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §§230.45(1)(b), and 111.375(2) Stats.
2. It is complainant's burden to show that discrimination occurred as alleged in the statement of issues for hearing.
3. Complainant failed to meet his burden with respect to the claim of sexual harassment as alleged in the first hearing issue.
4. Complainant failed to meet his burden with respect to the claim of sex discrimination and respondent's internal complainant procedure as alleged in the second hearing issue.

5. Complainant failed to meet his burden with respect to the claim of sex discrimination and respondent's decision to hire someone else for the First Shift Supervisor position as alleged in the third hearing issue.

6. Complainant failed to meet his burden with respect to the claim of Fair Employment Act (FEA) Retaliation and respondent's decision to hire someone else for the First Shift Supervisor position as alleged in the fourth hearing issue.

OPINION

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).

Issue #1: Sexual Harassment Claim

Complainant's allegation of sexual harassment is repeated below:

Whether complainant was sexually harassed in conjunction with the following incidents in 1996:

- a) Reimer sitting on Weier's lap and Weier sitting on Reimer's lap near and in the PMC work area in March or April 1996.
- b) A co-employee placing copies of derogatory, sexist e-mail messages written by co-employees in complainant's work storage area in June 1996.
- c) The use of e-mail for sexist messages by complainant's co-employees.
- d) Anti-male comments made by co-employees such as "men are idiots" and "men are morons" from February 1995 to August 1996.
- e) Comment by co-employee that "men are pigs" in November 1996.

- f) The use of e-mail by complainant's co-employees for non-business purposes.⁷
- g) The organization and planning of "girls night out" during business hours.

The FEA protects against harassment of a sexual nature (§111.36(1)(b), Stats.) and harassment (not necessarily of a sexual nature) based on sex (§111.36(1)(br), Stats.). The first hearing issue includes both types of claims.

The claims of harassment of a sexual nature include allegations "1b", "1c" and, arguably, "1a". This conclusion is based on the language of §111.36(1)(b), Stats. and on the related definition of "sexual harassment" found in §111.32(13), Stats. The text of both statutory provisions is shown below in relevant part.

§111.36(1), Stats.: Employment discrimination because of sex includes, but is not limited to, any of the following actions by an employer . . .

(b), Stats.: 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 or permitting sexual harassment to have the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment. Under this paragraph, substantial interference with an employee'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 employee 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.

⁷ Complainant was asked at oral arguments on December 17, 1998, to clarify the difference between the two e-mail allegations contained in the first hearing issue relating to sexual harassment. It was explained that allegation "1c" related to use of e-mail for sexist messages; whereas allegation "1f" referred to the facts that complainant had complained prior to March 1996, that his co-workers were using e-mail for non-business purposes, that nothing was done to correct the situation and that the improper use of e-mail ultimately led to the poems being placed in complainant's storage area in June 1996.

§111.32(13), Stats.: “Sexual harassment” means unwelcome sexual advances . . . 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.

The Commission first considers the totality of the circumstances relating to the surviving allegations, including (but not limited to) their number, severity and duration. See, *Kannenbergh v. LIRC*, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997), citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Allegation “1a” involves two incidents of lap sitting which were not directed at complainant and about which he did not complain. See, *Crear v. LIRC*, 114 Wis.2d 537, 339 N.W.2d 350 (Ct. App. 1983), which states: “We further hold that an employer cannot be held responsible [for claims of co-worker racial harassment] absent knowledge.” Allegation “1b” involved conduct directed at complainant and such conduct was nasty or mean-spirited in nature. Allegation “1c” (as explained more fully below) was not directed at complainant and occurred infrequently at best. Further, respondent took appropriate corrective action regarding the incidents of which it was aware. See, *Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94 and *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81. Also see *Rutland v. UW-Stout*, 92-0221-PC-ER, 6/22/95. The Commission concludes that these incidents (considered collectively) are insufficient for a reasonable person under the same circumstances to 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, within the meaning of §111.36(1)(b), Stats.

Regarding allegation “1c,” the co-workers’ use of e-mail for sexist messages was not directed at complainant or even shared with him. It is important to note that he went out of his way to find and become exposed to the e-mail he found objectionable and which he attached to

the complaint filed with this Commission (see ¶21 above). Exposure to sexually objectionable material, which the complainant could avoid but which he/she instead ferrets out or dwells upon, is not covered under the FEA. See for example, *Erdmann v. UW-Stevens Point*, 92-0104-PC-ER, p. 3, 4/23/93.

The remaining harassment claims (allegations “1d” through “1g”) are analyzed under §111.36(1)(br), Stats., the text of which is shown below:

(1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer . . . or other person . . .

(br) Engaging in harassment that consists of unwelcome verbal or physical conduct directed at another individual because of that individual’s gender, other than the conduct described in par. (b), and that has the purpose or effect of creating an intimidating, hostile or offensive work environment or has the purpose or effect of substantially interfering with that individual’s work performance. Under this paragraph, substantial interference with an employee’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 employee 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.

The Commission first notes that allegation “1f” (co-worker’s use of e-mail for non-business purposes and respondent’s alleged failure to correct same) was not shown to be an action based on complainant’s sex and, accordingly, is not actionable under §111.36(1)(br), Stats.

As to allegation “1g” (girls night out), complainant failed to establish that groups of workers gathering together outside of the workplace is a condition of employment or any other action prohibited under the FEA (see §111.322(1), Stats.). The potentially valid point he made about “girls’ night out” was that a co-worker, Ms. Coyne, went out of her way to make him feel excluded and he (apparently) felt she did so because of his sex.

The anti-male comments noted in allegations “1d” and “1e” must have been directed at complainant to be considered actionable under §111.36(1)(br), Stats. Only one anti-male comment in November 1996, was directed at complainant (part of allegation “1e”).

The Commission next considers the totality of the circumstances relating to the surviving allegations, including (but not limited to) their number, severity and duration. The “surviving allegations” include the portion of allegation “1g” which involved Ms. Coyne going out of her way to make complainant feel excluded from girl’s night out and the “men are pigs” comment in allegation “1e” which was directed at complainant in or around November 1996. Allegation “1g” occurred more than once but the record lacks a reliable estimate of how often Ms. Coyne made complainant feel excluded. Allegation “1e” occurred only once. The Commission also notes that complainant contributed to the inappropriate comments at work. The Commission further notes that complainant did not tell respondent about the conduct involved in either surviving allegation. The Commission concludes that these incidents (considered collectively) are insufficient for a reasonable person under the same circumstances to 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, within the meaning of §111.36(1)(br), Stats..

Issue #2: Sex Discrimination and Internal Complaint Procedure

The second hearing issue is whether sex discrimination occurred when respondent failed to follow its Internal Complaint Procedure with respect to its investigation of the e-mail poems. A prima facie case of sex discrimination would exist if the record shows that: 1) complainant is a member of a group protected under the FEA, 2) complainant filed an internal complaint of sexual harassment, 3) respondent failed to follow its procedure with respect to the internal complaint, and 4) circumstances exist which give rise to an inference that respondent’s failure to follow its procedures was because of complainant’s sex. Complainant’s sex is a characteristic protected under the FEA. Complainant did not establish the second element of the prima facie case because he filed neither an oral nor a written complaint under the harassment policy. Instead, his supervisors took the initiative in ensuring that investigation occurred. Even if complainant had established the first three elements of the prima-facie case, the facts are insufficient to establish the fourth element. The only potentially comparable situation involving a female was Ms. Mattson’s “complaint” against Manager DeClute. There

is no indication in the record that respondent handled her situation in a materially differently way than it handled complainant's situation. Accordingly, no inference of sex discrimination is raised.

Complainant was asked during oral arguments on December 17, 1998, what evidence he believed established the fourth element of his prima facie case. His response was that Ms. Mattson's complaint contained less serious allegations of sexual harassment than the e-mail poems placed in his storage box and yet Manager DeClute was given more severe discipline than the co-workers involved in the e-mail poems. In fact, however, Manager DeClute received less severe discipline than those involved in the e-mail poems. He was counseled regarding his behavior but received no reprimand whereas those involved in the e-mail poems received an oral reprimand. When this was pointed out during oral arguments, complainant responded saying there is so much confusion in the record about what constitutes counseling versus an oral reprimand that such confusion should result in a finding of discrimination. The Commission disagrees that the record is confusing. The record shows and common sense supports the conclusion that there is a difference between counseling an employe about inappropriate behavior and imposing an oral reprimand. Further, the record shows that all co-workers involved in the e-mail poems were told that they were being disciplined by imposition of an oral reprimand.

Issue #3: Sex Discrimination and the First Shift Supervisor Position

The third hearing issue is whether complainant was discriminated against on the basis of sex when he was not offered employment in the First Shift Supervisor position in 1996. A prima facie case would exist if the record shows that: 1) complainant is a member of a group protected under the FEA, 2) he applied for the first-shift supervisor position, 3) he was qualified for the position, and 4) he was not hired under circumstances which give rise to an inference of discrimination. Complainant failed to establish the third element of his prima facie case. Respondent was seeking applicants who had a type of prior supervisory experience which complainant did not have. Complainant pointed to his warehouse supervisory experience but such experience occurred about 10 years prior to the interviews and did not

include final authority to fire, any authority to hire or any authority to evaluate a subordinate's work experience. At hearing, complainant discussed the reasons why he thought he was a "lead worker" and why he thought he performed some "supervisory tasks" during the three-month period when the first shift supervisor position was vacant. None of the examples cited included responsibility for hiring, firing or evaluating co-workers; which are some of the hallmark distinctions of a supervisor in civil service by statutory definition (§111.81(19), Stats.⁸).

Complainant contended at oral arguments on December 17, 1998, that respondent should be found liable for the third hearing issue because respondent lost complainant's application materials. Specifically, complainant contends the Commission should apply Jury Instruction 410, to the effect that failure to produce a document within a party's control raises an inference that the document contains evidence unfavorable to that party's case. The Commission declines to apply the jury instruction in the context of this case. Jury instructions are not necessarily applicable to an administrative proceeding. Here, Ms. Paltz who conducted the first interviews and who did not pass complainant on for the second interview, testified as to what complainant told her at the interview. Complainant also testified about what he told Ms. Paltz. Complainant's and Ms. Paltz' testimony do not differ in a substantive way. Under these circumstances, it would be inappropriate to apply the requested jury instruction in this administrative proceeding.

Issue #4: FEA Retaliation and the First Shift Supervisor Position

The fourth hearing issue is whether complainant was retaliated against by respondent for engaging in fair employment activities when he was not hired for the First Shift Supervisor position in 1996. To establish a *prima facie* case in the retaliation context, there must be

⁸ Section 111.81(19), Stats., provides as shown below:

"Supervisor" means any individual whose principal work is different from that of the individual's subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employes, or to adjust their grievances, or to authoritatively recommend such action, if the individual's exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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 failed to establish a prima facie case because Ms. Paltz was unaware complainant had participated in any activity protected under the FEA when she made the decision that he was *insufficiently qualified to merit a second interview*.

Complainant conceded at oral arguments on December 17, 1998, that the record lacks direct evidence to establish that Ms. Paltz was aware of complainant's participation in a protected activity. He contended, however, that an inference exists in the record that she was aware of his participation in a protected activity because of Megan Johns' involvement in the e-mail poem incident. Ms. Johns did attend at least one meeting regarding the e-mail poems, although the record is unclear as to which meeting(s) she did attend. Ms. Johns' next involvement was in regard to respondent's search for complainant's application materials in February 1997, when respondent was preparing an Answer to the Complaint filed with the Commission. In short, Ms. Johns' involvement as described in the record is insufficient to raise an inference that she told Ms. Paltz about the e-mail poems prior to the time when Ms. Paltz determined complainant would not go forward to the second interview.

Complainant also argued that respondent should be held liable for the fourth hearing issue due to fact that complainant's job application is missing. This argument is based on jury instruction 410. *For reasons already discussed in this decision, the Commission rejects this argument.*

ORDER

This complainant is dismissed.

Dated: March 17, 1999.

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STATE PERSONNEL COMMISSION


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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