

**MARILYN SLEIK,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
COMMERCE,**  
*Respondent.*

**FINAL DECISION AND  
ORDER**

Case No. 97-0145-PC-ER

#### NATURE OF THE CASE<sup>1</sup>

This case was filed on September 24, 1997. It involves a charge of sex harassment by the creation of a hostile, intimidating, or offensive work environment. The November 13, 1998, conference report established the following issue for hearing:

Whether respondent discriminated against complainant by way of harassment because of gender pursuant to §111.36(1)(br), Stats., with regard to the following conduct:

- 1) Mr. Ritterbusch's boasts about failing a sex harassment course;
- 2) Negative comments on complainant's June 11, 1997, performance evaluation performed by Mr. Ritterbusch; and
- 3) Mr. Ritterbusch's practice of rummaging through complainant's desk, waste basket, and personal belongings.

#### FINDINGS OF FACT

1. Complainant has been employed by respondent as a petroleum inspector under the immediate supervision of Ray Ritterbusch, the Waukesha Petroleum Products

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<sup>1</sup> This case is before the Commission following the promulgation of a proposed decision and order pursuant to §227.46(2), Stats. The Commission has considered the objections to the proposed decision and order and consulted with the examiner. The Commission does not disagree with the findings of fact included in the proposed decision, but does make some minor additions and changes. Since the Commission has already addressed two of complainant's objections in an earlier ruling on December 3, 1999, it will not repeat its comments from that document.

District Supervisor since July 1994. Prior to that time she had been under the supervision of Darla LaGrave since complainant was appointed to her present position in March 1991. In 1994, Ms. LaGrave was appointed as Section Chief, Bureau of Petroleum Inspection and Fire Protection, where she supervised Mr. Ritterbusch who had been promoted to Ms. LaGrave's previous position in the supervisory level immediately over complainant. At the time Mr. Ritterbusch was promoted to the district supervisor job, complainant also had been a candidate for that promotion.

2. During the period of 1990 until the time this complaint was filed, Mr. Ritterbusch has, on a number of occasions, made jokes in the office, before other male and female employees,<sup>2</sup> about having failed a departmental course in sex discrimination and sex harassment.

3. Mr. Ritterbusch gave complainant her first performance evaluation on June 11, 1997. This evaluation (Complainant's Exhibit 5) had two choices for overall performance—"unacceptable" or "successfully met (or exceeded) the goals." Mr. Ritterbusch checked the latter description. In the "accomplishments/results" area there were a number of critical comments—e. g., "Reports are too brief without enough fact to be useful in potential enforcement action." The space for "supervisor comments" includes the following:

Marilyn Sleik has experienced some difficulty with service station operators that has resulted in them calling this office and also headquarters in Madison. For this reason I recommend that this inspector strive to communicate in a better way in the next year with her supervisor and outside customers. . . .

Ms. LaGrave reviewed this performance evaluation and signed it as the reviewer, which meant she had read it and found it reasonably accurate or fair.

4. In her next evaluation from Mr. Ritterbusch dated June 3, 1998, complainant had the same overall rating but there were no critical comments.

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<sup>2</sup> The Commission adds the information that his comments were made in front of both male and female employees to more fully reflect the record.

5. Prior to Mr. Ritterbusch's promotion to supervisor in 1994, Ms. LaGrave's performance evaluations of complainant were more detailed than Mr. Ritterbusch's and did not reflect any criticism of complainant's work.

6. Ms. LaGrave testified at hearing, and the Commission finds, that during her direct supervision of complainant, complainant's work performance was generally good, but that she had some problematical work behaviors—e. g., attendance, use of profanity, excessive mileage claims for use of her personal vehicle—which Ms. LaGrave chose to address informally and directly with complainant and not reflect in her performance evaluations.

7. Subsequent to the change in complainant's supervision in 1994, complainant complained to Ms. LaGrave about clashes between herself and Mr. Ritterbusch. Complainant never related her problems with Mr. Ritterbusch to sex discrimination. Ms. LaGrave got the impression that these problems were related to complainant having difficulty taking direction from someone who had been a peer prior to his promotion. In Ms. LaGrave's opinion, complainant and Mr. Ritterbusch had been friendly prior to his promotion.

8. On more than one occasion, Mr. Ritterbusch rummaged through complainant's desk drawers, waste paper receptacle, and personal items. He did not engage in this type of conduct with regard to other employees, whether female or male.<sup>3</sup>

## OPINION

It should be noted at the outset that the issue for hearing was framed from those allegations in the complaint which resulted in probable cause findings in the initial determination.<sup>4</sup> As set forth above, the statement of issues for hearing is as follows:

Whether respondent discriminated against complainant by way of harassment because of gender pursuant to §111.36(1)(br), Stats., with regard to the following conduct:

- 1) Mr. Ritterbusch's boasts about failing a sex harassment course;

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<sup>3</sup> The last sentence is added to more fully reflect the record.

<sup>4</sup> Complainant did not appeal, pursuant to §PC 2.07(3), Wis. Adm. Code, the parts of the initial determination that found *no* probable cause to believe discrimination had occurred.

- 2) Negative comments on complainant's June 11, 1997, performance evaluation performed by Mr. Ritterbusch; and
- 3) Mr. Ritterbusch's practice of rummaging through complainant's desk, waste basket, and personal belongings.

There was considerable evidence and arguments concerning allegations with respect to which no probable cause was found. This evidence has been considered to the extent it is relevant to the subject matter of the issues actually before the Commission, but has not been considered as part of complainant's claim per se, nor as part of the hostile environment complainant alleges.

Section 111.36(1)(br), Stats., prohibits employers from:

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. [111.36(1)](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.

In evaluating this issue, it is necessary to consider:

- 1) Whether the conduct was "directed at another individual because of that individual's [i. e., complainant's] gender," §111.36(1)(br);
- 2) Whether the conduct "has the purpose or effect of creating an intimidating, hostile or offensive work environment or substantially interfering with that individual's work performance," *id*;
- 3) In order to address the previous issue, it is also necessary to determine whether "a reasonable person under the same circumstance 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.” *Id.* In order to answer this question, it is necessary to consider the totality of the circumstances, including the number of times each alleged item of alleged misconduct occurred. *Cf. Kannenberg v. LIRC*, 213 Wis. 2d 373, 571N. W. 2d 373 (Ct. App. 1997).

Whether the conduct found above to have occurred is looked at as separate incidents or in its totality, the Commission can not find that it was motivated by complainant’s gender. The record in this case contains evidence critical of Mr. Ritterbusch’s interpersonal relationships with his subordinates, but it is consistent with the finding that the treatment was not a function of the subordinates’ gender. For example, the statement of one of complainant’s witnesses’ (Laurie Nelson) includes the following:

Ray [Ritterbusch] had no respect for his workers or customers . . . Ray was disrespectful to everyone who worked in his office under him. Ray’s workers avoid contact with him and fear his aggressive confrontations . . . Ray’s behavior and attitude are extremely disruptive to the work environment. He does not support a team environment and is actually disruptive to a functional work environment. (Complainant’s Exhibit 15)

The statement of another of complainant’s witnesses (Ronald Anderson) includes the following:

Soon after Ms. LaGrave left for a new position in Madison, Mr. Ritterbusch was promoted to a supervisory position. He became profoundly negative towards his subordinates.

He exhibited an unstable attitude toward supervision responsibilities by using his position to control the tone of each employe’s work environment. He found fault with even the most sincere efforts of his employes. (Complainant’s Exhibit 16)

If these and other comments are taken at face value, they are probative of a negative relationship between Mr. Ritterbusch and his subordinates in general, not just female employes, and possibly a personal animus to complainant. In addition to these factors, Ms. LaGrave testified that after she was promoted and was replaced by Mr. Ritterbusch, complainant discussed with her complainant’s problems with Mr.

Ritterbusch, but never attributed these issues to sex discrimination or sex harassment. Based on her lengthy experience supervising both complainant and Mr. Ritterbusch, Ms. LaGrave believed that the friction between complainant and Mr. Ritterbusch was at least in part a function of complainant having difficulty accepting supervision from a former peer who had received a promotion which complainant also had sought. She also testified about certain work behaviors by complainant which she had not reflected in her performance evaluations when she had supervised complainant. The Commission also notes that the only conduct that had an identifiable gender relationship was Mr. Ritterbusch's jokes about having failed the sex harassment course. While this activity is probative of a sexist attitude, these remarks were made to the whole office, which included both male and female employees. The Commission can not conclude that Mr. Ritterbusch's action of making this comment in front of complainant was motivated by complainant's gender.

In conclusion, in cases before the Commission, the party with the burden of proof—here the complainant, *see Krenzke-Morack v. DOC*, 91-0020-PC-ER, 3/22/96—must establish the facts necessary for liability “to a reasonable certainty by the greater weight or clear preponderance of the evidence.” *Reinke v. Personnel Board*, 53 Wis. 2d 123, 137, 191 N. W. 2d 833 (1971). The evidence here is insufficient to meet this standard. Because the Commission concludes that complainant did not satisfy her burden of proof to establish that Mr. Ritterbusch's conduct that was at issue in this case was directed at complainant because of her gender, it does not reach the question of whether that conduct meets the standard of a hostile work environment set forth at §111.32(1)(b), Stats.

#### CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proof to establish the facts necessary for liability “to a reasonable certainty by the greater weight or clear preponderance of the

evidence.” *Reinke v. Personnel Board*, 53 Wis. 2d 123, 137, 191 N. W. 2d 833 (1971).

3. Complainant has not satisfied her burden of proof.

ORDER

This complaint of discrimination is dismissed.

Dated: February 18, 2000

AJT:970145Cdecl.01

STATE PERSONNEL COMMISSION

  
LAURIE R. MCGALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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Brenda J. Blanchard  
Secretary, DCom  
PO Box 7970  
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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