STATE OF WISCONSIN PERSONNEL COMMISSION

TRACY WINTER (KACZIK)[1],
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 97-0149-PC-ER

RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent moved for dismissal of this case by letter dated March 3, 1998, contending the allegations were insufficient to support a finding of sexual harassment. Both parties filed written arguments with the final brief due on April 21, 1998. The facts recited below are undisputed, unless specifically noted to the contrary.

FINDINGS OF FACT

1. The complaint filed with the Commission on September 29, 1997, contains the follow description of the alleged discrimination:

> On Wednesday, September 10, 1997, at 0947 a.m., while I was sitting in the lower barracks at work waiting for Intake to start; Captain Hartman approached me from behind and grabbed my hair and asked: "Are you tight?". Sgt. Thompson was present in the barracks when this action took place. Later that same day I was in the front office while my fiancé was trying to get some days off and my fiancé was excited about getting the days off and talking and not really paying attention to what was going on around him. Capt. Hartman approached me while in the front office and asked: "Are you sure you want to go through with it?" I believe he was referring to my upcoming marriage. I believe these were sexual advancements made by Capt. Hartman to myself.

2. Respondent was unaware complainant felt the above acts constituted sexual harassment until respondent received notice from the Commission that she had filed a discrimination complaint. Respondent investigated the matter promptly. The only disputed action is whether Capt. Hartman made the comment about complainant going through with the marriage. Respondent took prompt remedial action with the result that no similar behaviors have reoccurred. (See respondent's Answer, dated 10/30/97, with attached investigatory notes.)

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[1] Complainant's last name changed after she filed this complaint.

3. Complainant wears her hair in a bun. It was commonplace for co-workers to touch her bun and remark upon how tightly it was wound. It was a standing joke that complainant's mood could be measured by how tight she wound her bun on any particular day. Respondent filed an Answer to the complaint by letter dated October 30, 1997, and attached its summary of the investigation conducted after respondent learned that this complaint was filed. The investigatory summary includes the following paragraphs (from pp. 1 and 3 respectively):

> According to Captain Harman and other staff interviewed, it is an ongoing joke at the Center that the tightness of Sgt. Winter's hair is an indicator of her mood for the day. If her hair is bound tight, than she is in a bad mood; if her hair is bound loosely, than she is in a good mood.
> . . .
>
> Captain Hartman admits he touched Sgt. Winter's hair and made a statement about its tightness. This is confirmed by witnesses . . . During our investigation, we found that another co-workers have also touched Sgt. Winter's hair and that numerous co-workers inquire about the "tightness" of Sgt. Winter's hair. When asked about others touching her hair or making comments about the tightness of her hair, Sgt. Winter stated she does not believe her co-workers' actions are sexually harassing or harassment based on sex.

Complainant does not dispute the accuracy of the information cited above.

4. The full text of complainant's brief (dated 4/8/98) filed in response to the motion is shown below:

> The following will be my written argument for Summary Judgment.
>
> I feel the Motion is premature as the investigation being conducted by the Personnel Commission is not yet complete.
>
> The respondent notes "the Complainant fails to allege expressly and in any detail that the alleged actions of the Captain negatively affected complainant's work environment."
>
> I believe there have been several incidents. One being the Captain involved told numerous co-workers to watch what they say around the complainant, as he has been through it.
>
> In conclusion, I believe there are serious issues of material fact that only a hearing or investigation can uncover.

OPINION

Summary judgment should only be granted in clear cases. See *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (citations omitted):

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
>
> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

The two alleged events of sexual harassment occurred on the same day. It is undisputed that respondent took prompt remedial action and that no similar acts have reoccurred. Respondent asserts that accepting all allegations as true, complainant has failed to show she was subjected to sexual harassment within the meaning of the Fair Employment Act (FEA). The Commission agrees.

The FEA definition of sexual harassment is found in §111.32(13), Stats., as shown below in pertinent part:

> "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. . . . "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; . . . 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.

Prohibited sexual harassment is described further in §111.36(1), Stats., as shown below in pertinent part:

> Employment discrimination because of sex includes . . .
> (b) Engaging in sexual harassment. . . 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.

The alleged events of September 10, 1997, taken as true for purposes of this motion, are insufficient as a matter of law to establish complainant's claim of sexual harassment. The touching of complainant's hair and reference to the tightness of her hair bun was not uncommon in the workplace and had been going on with her consent up to September 10, 1997. Complainant has not shown (or even alleged) that the two events interfered substantially with her work performance. Nor were the two events sufficiently pervasive, severe, threatening or humiliating that a reasonable person under the same circumstances would feel the working environment was intimidating, hostile or offensive. *See*, e.g., *Butler v. DOC*, 95-0160-PC-ER, 1/14/98.

Complainant, in response to the present motion, provided sketchy details to the effect that Capt. Hartman "told numerous co-workers to watch what they say around the complainant, as he has been through it." Such comment necessarily occurred after the date the present complaint was filed. Further, the action complained of may be characterized as retaliation for participating in a protected activity under the FEA, but is not conduct of a sexual nature similar to the conduct alleged in the complaint. Nor has complainant filed a separate complaint of retaliation.

Complainant also contended in response to the present motion that she believes "there have been several incidents." The filing of her brief was her opportunity to bring forward all relevant facts at the known risk that failure to do so could result in dismissal of her case. Her general allegation that she believes "there have been several incidents" is insufficient to defeat respondent's motion for summary judgment.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b), Stats.

2. Respondent has the burden to show that summary judgment is appropriate.

3. Respondent has met its burden.

ORDER

Respondent's motion for summary judgment is granted and this case is dismissed.

Dated: May 6, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR
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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