STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA DEJONGH,
Complainant,

v.

Secretary, DEPARTMENT OF FINANCIAL INSTITUTIONS,
Respondent.

Case No. 98-0121-PC-ER

RULING ON MOTION TO DISMISS

NATURE OF CASE

This case involves a complaint of sexual harassment in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. Respondent has filed a motion to dismiss on the basis of failure to state a claim upon which relief may be granted. Both parties have filed briefs. Also, an "amici reply brief", in opposition to complainant, was filed by Mark Schlei, respondent's Division of Banking, Deputy Administrator[1]. The Commission deliberated on the case at its meeting on May 5, 1999, and decided to provide counsel an opportunity to submit additional briefs to address the impact on this case of *Jim Walter Color Separations v. LIRC*, 98-2360 (Ct. App. 4/8/99). The parties and Mr. Schlei filed additional arguments.

The following facts are based on information provided by the parties, appear to be undisputed and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. Complainant Barbara DeJongh works as a Program Assistant 4 Leadwork of the Annual Reports section of respondent's Division of Corporate and Consumer Services (DCCS). She has been employed by the division since March

[1] The basis of complainant's complaint of sexual harassment is the alleged conduct of Mark Schlei

1987. Robert Ritger is her immediate supervisor. Mr. Schlei is the Deputy Administrator of DCCS and thus in the line of supervisory authority over complainant.

2. On June 25, 1998, complainant filed with the Personnel Commission a complaint of sexual harassment against respondent, alleging the following:

> On December 8, 1997, my first day back from my six month maternity leave, I was present along with several co-workers at Debbie Matousek's . . . work station when Mr. Schlei was asked if it was his fault that the computers were down this morning. He responded by saying, "I pissed on it." No one responded. I was very offended by this obscene remark.
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> It became evident to me on December 19, 1997, that Mr. Schlei had some hostility towards me . . . While in Mr. Hunter's office [during my break] I noticed Mr. Schlei walk by the interior office window. When I returned to my work station a note from Mr. Schlei was on my chair instructing me to stop and see him. I went to Mr. Schlei's office and he made it clear to me that he was the "acting Administrator" of the division, not Mr. Hunter. He indicated to me that if I should have any questions, I should come to him. He then initiated discussions regarding my break time. Mr. Schlei insisted that the time I had just spent with Mr. Hunter was NOT my break, even though I told him it was. Mr. Schlei continued to insist it was NOT my break and that I should still take a break. Mr. Schlei made me feel he was angry towards me for talking with Mr. Hunter.
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> On January 13, 1998 . . . while Mr. Ritger were looking at his computer. Mr. Schlei stopped in the doorway and asked "What are you doing?" I replied, "I liked Robert's screen saver and he was showing it to me." Mr. Schlei then commented to me, "why don't you get an x-rated one?" Mr. Ritger and I looked at each other and clearly we both were uncomfortable with Mr. Schlei's offensive and unsolicited remarks. To communicate my disapproval to Mr. Schlei of his remark, I replied, "I think I am too conservative for one of those." Mr. Schlei, however, continued his conversation by telling us how he accidentally found an x-rated screen saver by looking up Marlena Dietrich's name and two women appeared on the screen dressed in leather. The discussion of the screen saver evolved into a discussion of a sexual nature by Mr. Schlei.
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> On February 17, 1998, I was returning to the office with Nancy Strizic and Jenny Acker and noticed Mr. Schlei waiting by the elevator. I cordially said, "Hi Mark." He did not verbally reply, instead he gave me a very hateful and intense glare. I expressed to Ms. Strizic that his

> look was frightening. She agreed. Ms. Strizic commented to me that he was only looking at me. I was very upset by Mr. Schlei's hateful and intense glare. I also felt very threatened by Mr. Schlei's demeanor toward me.

Complainant also alleges that since December 8, 1997, respondent has been aware of Mr. Schlei's behavior toward her, and it has failed to correct the situation. Complainant alleges that Mr. Schlei's continued involvement and presence with DCCS, makes it "extremely difficult at times" to concentrate on her work due to her fear of further sexual harassment and confrontations such as the hateful glares.

3. Respondent's motion to dismiss was filed prior to the completion of the Commission's initial determination investigation.

4. Complainant made the following additional allegations in her brief filed on March 8, 1999:

- Mr. Schlei does not make vulgar comments of the kind alleged ("I pissed on it.") around male employes, but does so only around female employes;
- Mr. Schlei does not tell male employes with whom they should socialize on their break times;
- Mr. Schlei does not address male employes with "hateful glares."

CONCLUSIONS OF LAW

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

2. As a matter of law, assuming all facts alleged as true, this case does not meet the standard for claims arising under §111.36(1)(b) and (br), Stats.

OPINION

In *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979), the court provided guidelines for testing a motion to dismiss for failure to state a claim, as follows:

> For the purpose of testing whether a claim has been stated pursuant to a motion to dismiss . . . the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and,

> therefore, it is not necessary for plaintiff to set out in the complaint all the facts which must eventually be provided to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer—to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed as legally insufficient only if "it is quite clear that under no conditions can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted. (Citations omitted)

The Commission employs these general rules when considering motions to dismiss of this nature. *See Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96.

The complainant, in opposing the present motion, asserted that DFI actually is requesting a summary judgment during the investigation stage of this proceeding and, citing *Jacobs v. Glenmore Distilleries Co.*, (LIRC, 11/25/95), raises the question of the Commission's authority for such an action. Complainant contends that entertaining a motion for summary judgment prior to the Commission completing an investigation "puts the cart before the horse." The Commission disagrees. In *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92, the Commission observed that pursuant to §227.42(1)(d), Stats., an evidentiary hearing in a contested case is only required when "[t]here is a dispute of material fact." The Commission held that "if it can be determined that there are no disputed issues of material fact, the Commission can issue a decision without an evidentiary hearing in what amounts functionally to a summary judgement proceeding." *Balele,* at p.5.

In *Balele v. WPC*, 98-1432, December 23, 1998, petition for review denied, April 6, 1999, the Court of Appeals recently cited the foregoing case with approval and held as follows:

> It is not necessary for us to decide whether the commission may employ a summary judgment procedure which replicates the form and function of §802.08, STATS. We conclude that the summary disposition procedure used by the commission in the cases currently before us was not a full-blown summary judgment procedure of the type established under §802.08, for actions in circuit court. The DER and the DMRS filed motions to dismiss Balele's complaints, asserting that even if

> Balele's factual allegations were true, he had not stated a claim against the DER and the DMRS because the statutes did not give them control over the decisions that Balele alleged were unlawful. In response, Balele submitted additional material which he contended proved that the DER and the DMRS controlled the appointment process. The commission considered Balele's additional material and determined that the facts as shown by this additional material, and the allegations of Balele's complaint, even if true, did not state a claim against the DER and the DMRS.
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> Thus, although the commission considered "matters outside the pleadings," the DER/DMRS motions were still decided on the grounds that Balele's allegations had failed to state a claim, not on the basis that he had failed to establish a genuine factual dispute. We conclude that the commission's consideration of matters beyond Balele's complaint does not preclude it from granting a motion to dismiss for failure to state a claim. Because the commission dismissed Balele's complaints for failure to state a claim, we need not decide here to what extent the commission's summary dispositions in other contexts may permissibly parallel the summary judgment procedures authorized by §802.08, STATS., for actions in circuit court." Slip opinion, pp.7-8. (footnote omitted)

Similarly, in the instant case respondent has filed a motion to dismiss for failure to state a claim. In addressing such a motion, the Commission must determine whether the allegations of the complaint, taken as true, state a claim under the WFEA. In her brief in opposition to the motion, complainant has made certain additional allegations (as noted in 4 of the Findings of Fact) that relate to the matters alleged in the complaint. Under these circumstances, and in keeping with the precedent cited above, the Commission will assume, for the purpose of deciding this motion, both the facts alleged in the complaint and the additional facts alleged in the brief.

The Commission disagrees with complainant's assertion that it is *ipso facto* inappropriate to entertain this motion to dismiss because this case is still in the investigative stage. Complainant is represented by counsel. She presumably is capable of articulating what she finds offensive or improper about Mr. Schlei's conduct. The Commission will assume as true for purposes of deciding this motion all such conduct she might allege. An investigation conceivably could unearth evidence which would

make the occurrence of such allegations more or less likely, but would do nothing to add to the repository of conduct complainant perceives as offensive or improper.

Addressing an issue related to the immediately foregoing, the Commission rejects complainant's contention that this case must be evaluated on a probable cause standard. The motion to dismiss for failure to state a claim involves the issue of whether the facts complainant alleges, taken as true, state a claim as a matter of law under the WFEA. The determination of probable cause involves the question of whether there is enough evidence in support of a claim to move the case on to the next level of a hearing on the merits.

The Commission now turns to a discussion of the claims of sexual harassment. 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.). See *Hecht v. UWHCA*, 97-0009-PC-ER, 3/16/99.) This case involves both types of claims. All allegations raised by complainant are summarized below:

1. Mr. Schlei making vulgar comments around female employes and not around male employes, such as his comment on December 8, 1997, to the effect that he "pissed" on the computer
2. Mr. Schlei interfering with female employe's use of break time but not with male employe's use of break time as shown by Mr. Schlei telling complainant on December 19, 1997, with whom complainant should socialize on her break time.
3. Mr. Schlei addressing female employes with "hateful glares" but not male employes as shown by the "hateful glare" he gave complainant when she said good morning on February 17, 1998.
4. Mr. Schlei's comments on January 13, 1998, which arose in the context of a discussion about screen savers. Specifically, he said, "Why don't you get an x-rated one?" He also entered into a conversation about accidentally finding an x-rated screen saver by looking up Marlena Dietrich's name and finding two women on the screen dressed in leather.

The parties agree that allegations 1, 2 and 3 are claims of harassment based on sex but not based on incidents of a sexual nature. It is appropriate to analyze these

allegations under §111.36(br), Stats., the text of which is shown below in pertinent part:

> 111.36 SEX, SEXUAL ORIENTATION; EXCEPTIONS AND SPECIAL CASES. (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer . . . or other person:
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> (br) Engaging in harassment that consists of unwelcome verbal or physical conduct directed at another individual because of that individual's gender . . . 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 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 Commission, in the context of the present motion, must look at the facts in a light most favorable to complainant. As a result, the Commission accepts as true the facts alleged by complainant as support for allegations #1, 2 and 3 as noted in ¶¶2 and 4 of the Findings of Fact.

In determining whether sufficient facts have been alleged to support a claim of harassment under §111.36(1)(br), Stats., the Commission considers the totality of the circumstances raised in the allegations #1, 2 and 3; including, but not limited to, their number, severity and duration. The Commission also considers the cumulative effect of all the incidents. See, *Kannenberg 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).

Here there were three incidents, two occurring in December 1997 and one in February 1998. The comment about "pissing" on the computer was made in front of a group of employes (presumably all female) and was offensive. Mr. Schlei's interference with complainant's break time on December 19, 1997, was directed at complainant in a private conversation (meaning that only Mr. Schlei and complainant

were present). His "hateful glare" in greeting complainant on February 17, 1998, was directed at complainant when other (female) employes were present. The conduct was not repeated.

The courts have provided guidance for determining whether specific situations amount to a hostile work environment. The facts of the cases cited below included claims of a sexual nature. However, the discussion of what constitutes a hostile or offensive work environment may be useful in analyzing whether a reasonable person would consider the conduct noted in allegations #1, 2 and 3, as 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.

> *Oncale v. Sundowner Services, Inc.*, 118 S. Ct. 998 (1998): The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment that a reasonable person would find hostile or abusive is beyond Title VII's purview. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace - such as male on male horseplay or intersexual flirtation - for discriminatory conditions.
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> *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 77 FEP Cases 14, 18, (1998): A recurring point in these opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.
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> *Faragher*, 77 FEP Cases at 18-19: These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.

Past Commission decisions are consistent with the guidelines noted above. The Commission, for example, in *Bruflat v. DOCom*, 96-0091, 96-0042, 97-0070-PC-ER, 7/7/98, found that two inappropriate and offensive statements made on the same day

("choking the chicken," a reference to masturbation) were insufficient to establish a hostile environment claim. The Commission in *Winter v. DOC*, 97-0149-PC-ER, 5/6/98, found, as a matter of law, that two events occurring on the same day (male employe touching a female complainant's hair bun and commenting about her mood) were insufficient to establish a hostile environment claim. The Commission in *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98, found that two incidents (female complainant being told by a male employee that a prison was not a place for a woman to work and male employee on same day referring to complainant as a bitch and/or a slut) were insufficient to establish a hostile environment claim.

The events involved in the present case involve offhand comments ("pissing" on the computer and the discussion about screen savers) and one isolated incident (interfering with complainant's break time) which cannot be characterized as "extremely serious," within the meaning of the passage previously cited from the *Farragher* case. The Commission concludes that these incidents (considered collectively) are insufficient for a reasonable person under the same circumstances to consider sufficiently severe or pervasive to interfere substantially with the individual's work performance or to create an intimidating, hostile or offensive work environment, within the meaning of §111.36(1)(b), Stats.

The Commission now turns to an analysis of the fourth allegation, relating to Mr. Schlei's comments on January 13, 1998, which arose in the context of a discussion about screen savers. The Commission, in the context of the present motion, must look at the facts in a light most favorable to complainant. As a result, the Commission accepts complainant's allegations as true (as noted in ¶2 of the Findings of Fact). Also as a result, the Commission proceeds with the legal presumption that respondent is responsible for the conduct of Mr. Schlei, as complainant's supervisor, under the principles of respondeat superior. (*See Rutland v. UW*, 92-0221-PC-ER, 6/22/95.)

Finally, the Commission accepts as true that the content of Mr. Schlei's comments were sexual in nature.[2]

The statutory provisions relevant to the fourth allegation are recited below:

> §111.32(13), Stats.: "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. §111.32(13), Stats.
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> §111.36 (1), Stats.: Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing agency or other person: . . .
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> (b) Engaging in sexual harassment; or implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment; or making or permitting acquiescence in, submission to or rejection of sexual harassment the basis or any part of the basis for any employment decision affecting 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 employ's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employe would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

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[2] Respondent contended the comments were not sexual in nature. See respondent's brief dated May 26, 1999, p. 7.

A recent case issued by the Wisconsin Court of Appeals provides a starting point for analyzing the fourth allegation. In *Jim Walter Color Separations v. LIRC*, 98-2360, 4/9/99 (hereafter referred to as JWCS), the employer was a small, family-owned business. The sexual harassment in question was carried out by the employer's vice-president. While LIRC had decided that the employer had engaged in sexual harassment, the circuit court concluded "that the acts found by LIRC were not sufficiently severe so as to substantially interfere with [complainant's] work performance or to create an intimidating, hostile or offensive work environment, and therefore *JWCS* had not engaged in sex-based and sexual harassment." Slip opinion, p.5. The court of appeals reversed. The court categorized the vice-president's conduct as essentially the conduct of the employer. The court interpreted §111.32(13), Stats., as requiring a hostile environment as a necessary element of a sex harassment claim only in those cases where the harassing conduct can not be imputed to the employer directly but rather is conduct the employer permits to occur. The court's decision includes the following:

> As it explained it its memorandum opinion, LIRC interprets §111.32(1)(b), STATS., to provides [sic] three separate categories of prohibited conduct: (1) an employer engaging in sexual harassment; (2) an employer explicitly or implicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment or the basis of any part of a decision affecting the employee ("quid pro quo"); and (3) permitting sexual harassment to substantially interfere with an employee's work performance or to create an intimidating, hostile or offensive work environment (collectively, "hostile environment"). According to LIRC's interpretation, under the first category, there is employment discrimination based on sex if the employer—that is, the owner or an agent in a position of responsibility such that it is appropriate to apply the rule of respondeat superior and treat the actions of the agent as being the actions of the employer—engages in conduct that meets the definition of sexual harassment, whether or not that conduct creates a hostile work environment.
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> JWCS responds, and the trial court apparently agreed, that LIRC's interpretation of the statute is unreasonable and inconsistent with the plain meaning of the statute. According to JWCS, an employer does not

engage in sexual harassment unless there is either a quid pro quo or a hostile work environment. Since there is no question in this case concerning the former, JWCS contends, LIRC could not conclude there was discrimination based on sex unless it found that O'Brien's conduct created a hostile work environment for Tobias. JWCS asserts that LIRC did not make that necessary finding, and that the evidence does not support such a finding. JWCS does not challenge any finding as unsupported by substantial evidence, except the determination that JWCS engaged in sex-based and sexual harassment.

We conclude that LIRC's interpretation is consistent with the plain language of §§111.36(1)(b) and 111.32(13), STATS. The introductory language of §111.36(1) makes clear that the subsection is directed to "actions by any employer." In the first sentence of para. (b), various actions are grouped in phrases that are separated by semicolons followed by the word "or." Under the ordinary rules of grammar, the conduct in each phrase is a distinct basis for a violation of the prohibition against discrimination based on sex. The first phrase of the first sentence is "[e]ngaging in sexual harassment." The second and third phrases concern making or permitting terms or conditions of employment or employment decisions that are based on "quid pro quo." The fourth and last phrase refers to permitting sexual harassment to create a hostile work environment. The second sentence further defines the fourth phrase. LIRC's reading of this section to create three separate categories of prohibited conduct by an employer (treating the second and third phrase as creating one "quid pro quo" category) is consistent with the plain language of this section. The first category is directed to conduct the employer itself engages in; the second category ("quid pro quo") to conduct the employer either engages in or permits, and the third (hostile work environment) to conduct the employer permits.

In construing the first category of prohibited conduct, "[e]ngaging in sexual harassment," we must next turn to the statutory definition of sexual harassment in §111.32(13), STATS. The first sentence contains a number of alternative definitions, one being "unwelcome verbal or physical conduct of a sexual nature." It is true that the latter definition is further subdivided in the third sentence into alternatives, one being "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." But the third sentence plainly states that "[u]nwelcome verbal or physical conduct of a sexual nature includes but is not limited to" those alternative definitions. Therefore, we conclude

> "unwelcome physical contact of a sexual nature" and "unwelcome verbal or physical conduct of a sexual nature" may constitute sexual harassment even though they do not create a hostile work environment.
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> We also conclude that LIRC's interpretation of the statute is a reasonable one. As LIRC explained in its memorandum opinion, the third category of prohibited conduct in §111.36(1)(b), STATS., permitting a hostile work environment, is "necessary to address sexual harassment engaged in by co-workers who can not be treated as outright agents of the employer in connection with their harassing behavior. [This category] obliges [sic] the employer to take steps to prevent or terminate sexual harassment in the work place, even if the employer (or its agents) is itself not 'engaging in' the sexual harassment, if the harassment engaged in by other employes is severe enough that it . . . interferes with work or created a hostile, intimidating environment." JWCS argues that LIRC's interpretation of the statute has the effect of creating a stricter standard when an employer (an owner or an agent under the principle of respondeat superior) engages in sexual harassment than when a co-employee does, because in the former situation the conduct need not be severe enough to create a hostile work environment. Assuming it is true that LIRC's interpretation does create a stricter standard when the employer's own conduct is at issue, we do not agree that is unreasonable. Owners and agents under the principle of respondeat superior know their own conduct toward an employee but do not necessarily know the conduct of one employee to another; they can control their own conduct in a way they cannot necessarily control the conduct of one employee to another. (Footnotes omitted) Slip opinion, pp.7-10.

The court in *JWCS*, concluded that unwelcome verbal or physical conduct of a sexual nature may constitute sexual harassment even though such conduct does not create a hostile work environment. The court based this conclusion on the wording of §111.32(13), Stats., the pertinent text of which is shown below (with some added emphasis and reorganization to facilitate understanding of the following discussion):

> "Sexual harassment" means . . . unwelcome verbal or physical conduct of a sexual nature . . . "Unwelcome verbal or physical conduct of a sexual nature" includes <u>but is not limited to</u>:

> - 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 court emphasized the underlined language above "but is not limited to" and from this language concluded it was possible to have an actionable claim of unwelcome verbal or physical conduct without the prerequisite of a hostile work environment. The court's decision, however, did not describe the threshold circumstances under which such conduct would constitute sexual harassment. It was this unanswered question which led the Commission to provide the parties and Mr. Schlei to submit additional briefs.

The Commission faced a similar question in a claim filed under the Whistleblower Law (§230.80, Stats., et. seq.), *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88; aff'd. *Vander Zanden v. DILHR*, 88-CV-1223 (Dane County Cir. Ct. 5/25/89; aff'd. *Vander Zanden v. DILHR and Wis. Pers. Comm.*, 89-1355 (Ct. Appeals, 1/10/90 - unpublished). The statutory provision at issue was §230.80(2), Stats., the text of which is shown below (emphasis added):

> "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, <u>including but not limited to</u> any of the following:
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> a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
> b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
> c) Reassignment.
> d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

The Commission recognized that actions not enumerated in the statute could constitute "disciplinary action," but only under limited circumstances. The Commission's rationale is reflected from the following excerpt:

> There is a rule of statutory construction (the doctrine of *ejusdem generis*) which provides that where specific words follow a general term, the general term is applied only to things that are similar to those enumerated. *Swanson v. Health & Social Services Department*, 105 Wis. 2d 78, 85 (Ct. App. 1981), citing C. Sands, 2A *Statutes and Statutory Construction*, §41.17, at 103 (1973).
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> The statutory definition under consideration here equates "disciplinary action" with an action of having the effect of a penalty, and then includes a long series of examples: dismissal, demotion . . . The general term "penalty" must be interpreted in the context of the specific terms used within the definition, each of which has a substantial or potentially substantial negative impact on an employe. The same cannot be said of the limitations Mr. Marty imposed on complainant's contacts with the Oshkosh Job Service Office, particularly in view of the fact that the duties and responsibilities of complainant's position did not necessitate frequent contacts with such office and Mr. Marty's limitation's did not prevent but only rerouted such contacts. Therefore, while the Commission does not disagree with the findings set forth in the proposed decision, it can not conclude that the limited restrictions on complainant's activities set forth in the findings meet the statutory definition of "disciplinary action."

Both the Circuit Court and the Court of Appeals approved of the Commission's use of *ejusdem generis* to resolve the case. The Circuit Court's rationale was adopted by the Court of Appeals as an "excellent analysis." The Circuit Court's rationale is reflected by the following excerpt (taken from pp. 3-4, *Vander Zanden v. DILHR*, 88-CV-1223, 5/25/89):

> The commission examined the language of the statute and also applied the maxim *ejusdem generis*. This rule of statutory construction applies not only when a general term follows a list of specific things, but also where, as here, a list of specific words follows a more general term, *Swanson v. Health and Social Services Dept.*, 105 Wis. 2d 78, 85, 312 N.W.2d 833 (Ct. App. 1981). The rule provides that the general term

> applies only to things that are similar to those specifically enumerated. All of the enumerated disciplinary actions or penalties have a substantial or potentially substantial negative impact on an employee. The limitations imposes on Plaintiff's contacts with the Oshkosh Job Service office, while perhaps annoying and perhaps an example of poor management practices bordering on childishness, do not rise to the level of a penalty or a disciplinary action akin to those enumerated in §230.80(2). The common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform ones job efficiently . . .

It is appropriate to apply the same doctrine of statutory interpretation (*ejusdem generis*) here. In other words, a claim of sexual harassment based upon unwelcome verbal or physical conduct of a sexual nature need not be based on one of the situations enumerated in §111.32(13), Stats., but must be similar. The enumerated situations are repeated below:

- 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.

Not only is the situation presented here not enumerated in §111.32(13), Stats., it also is not of a similar nature in terms of seriousness or significance. Here, Mr. Schlei made inappropriate and offensive comments of a sexual nature on one occasion. The comments arose in the context of a discussion about computer screen savers and were made in the presence of complainant and a male co-worker. The circumstances here do not rise to the level of interfering with complainant's work performance or of creating an intimidating, hostile or offensive work environment. The Commission concludes that a reasonable person would characterize the circumstances presented in the fourth allegation as an isolated incident that was *de minimus* in nature.

The brief filed by Mr. Schlei by cover letter dated May 26, 1999, included the following argument (pp. 3-4):

> To take one such allegation and call it sexual harassment (i.e. make it actionable) would be to subvert the entire purpose of the Wisconsin Fair Employment Act. Employees would come from all around . . . alleging that one joke, with a hint of sexuality; one conversation, in which a comment was taken not as intended, or; one e-mail, misconstrued because the recipient could not interpret the sender's body language visually, is the basis for a cause of action against an employer. Schlei submits that this is not the intent of the Act or the legislature and (that) the Personnel Commission must dismiss this action consistent with the only reasonable interpretation of the Act under the facts and circumstances of this case: that the facts and circumstances alleged by complainant do not constitute sexual harassment.
>
> The facts in *JWCS* and the facts alleged by complainant here are totally distinct. The complainant in *JWCS* alleged:
>
> 1. On May 19, 1998, O'Brien attempted to kiss Tobias on the lips for her birthday;
> 2. In April or May 1989, O'Brien confronted Tobias and told her to hold out her hand, put a chocolate egg in her hand and attempted to kiss her (his lips brushed her neck as she turned away);
> 3. In early 1991, O'Brien referred to the sweatshirt that Tobias was wearing as her "breast feeding sweatshirt;"
> 4. In later 1991, O'Brien was present when a client complimented Tobias on her blouse, and he said "Yes, well, I kinda like what's under it myself;"
> 5. In early 1992, O'Brien commented again that Tobais was wearing her "breast feeding sweatshirt;"
> 6. In summer, 1992. O'Brien slapped Tobias on the buttocks as she entered a car;
> 7. After Tobias lost some weight, O'Brien commented that he wondered why Tobias' boobs never got any smaller because his wife's did after she lost weight;
> 8. In May 1994, O'Brien threw a kernel of popcorn down the front of Tobias's shirt, commenting that "it was just so tempting;"
> 9. Shortly before or after this incident, O'Brien again slapped Tobias on the buttocks and laughed.

> *See JWCS* at 3-4. Juxtapose these facts with those of the case at bar. One fact, the screen saver incident, is the sole allegation of prohibited conduct under the WFEA which the complainant alleges.

The Commission found elements of the passage cited above persuasive. The Commission also believes that the Legislature did not intend each and every off-color or distasteful remark made by a supervisor or an agent of the employer to be actionable. The Commission is not presented with the necessity in the present case of precisely defining what the threshold requirements are under *JWCS*. The Commission can say that the *de minimus* allegation raised here is insufficient. The Commission is not required and does not attempt to further explain the *JWCS* case.

ORDER

Respondent's motion to dismiss complainant's complaint for failure to state an actionable claim is granted and this case is dismissed.

Dated: June 10, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:rjb:980121Crul1

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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.)