STATE OF WISCONSIN PERSONNEL COMMISSION

TAMMY A. DEVRIES,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0158-PC-ER

HEARING EXAMINER'S RULING ON RESPONDENT'S OBJECTION TO COMPLAINANT'S PROPOSED STATEMENT OF ADDITIONAL ISSUE OR SUBISSUE

This case involves a complaint of discrimination on the basis of sex and retaliation, in violation of the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.). The complaint alleges that complainant was sexually harassed by a co-worker, that she complained to management about this, that management discharged the co-worker, that as a result of the foregoing she was harassed by her co-workers, and that management's response was insufficient. The complaint further alleges that the co-worker had engaged in sexual harassment prior to this occasion and that respondent was negligent in hiring, training and disciplining the co-worker prior to or during the time he was harassing complainant.

During a pre-hearing conference held March 16, 2000, the examiner set forth the following statement of issue for hearing:

> Whether there is probable cause to believe that complainant was discriminated against on the basis of sex or retaliated against for engaging in protected fair employment activities in violation of the WFEA with respect to respondent's handling of her sex harassment complaints in 1998. Conference report dated March 17, 2000, p.1.

Complainant proposed the following statement of additional issue or sub-issue:

> Whether there is probable cause to believe that respondent violated the WFEA with regard to its handling of complainant's sex harassment complaints, because it knew or should have known that the alleged harasser of complainant had a propensity for harassment, and respondent was culpable both in hiring this person, and in failing to have

> taken adequate preventative measures with regard to sex harassment once he had been hired. *Id.*

Respondent objected to the consideration of complainant's proposed issue or sub-issue, and the parties have filed briefs.

Respondent contends in effect that complainant's proposed issue does not state a claim under the WFEA. Respondent argues as follows:

> Officer Hartlerode was not a supervisor and therefore the respondent is not vicariously liable. *E. g., Faragher v. City of Boca Raton,* 524 U. S. 775, 118 S. Ct 2275, 141 L. Ed. 2d 662 (1998). Direct liability requires the employer's actual or constructive knowledge of conduct that would constitute sexual harassment. Any such liability is premised on actions of the respondent subsequent to knowledge of the harassment and is clearly encompassed by the first issue. Complainant's brief in support of objection, p. 4.[1]

Section 111.36(1)(b), Stats., provides that an employer engages in discrimination because of sex if it permits "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." There is nothing in this subsection that requires as an element of an employer's liability for sex harassment that the employer have actual knowledge of harassment, or which would rule out liability because of sex harassment attributable to an employer's negligence in hiring or directing its non-management employes. This conclusion is not inconsistent with § 111.36(3), Stats., which provides:

> For purposes of sexual harassment claims under sub. (1)(b), an employer . . . is presumed liable for an act of sexual harassment by that employer . . . or by any of its employes . . . if the act occurs while the complaining employe is at his or her place of employment and . . .

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[1] Respondent contends that the sub-issue sounds in tort law, an area over which the Commission has no jurisdiction. *Cf. Becker v. Automatic Garage Door Co.,* 156 Wis. 2d 409, 415, 456 N. W. 2d 888 (Ct. App. 1990), *review denied,* 458 N W. 2d 533 ("no authority for support of a common law claim for permitting sexual harassment in the workplace. . . .the WFEA created a new right and remedy to meet this situation.")

> informs the employer . . . of the act, and if the employer . . . fails to take appropriate action within a reasonable time.

This subsection sets forth the circumstances under which a presumption of liability arises; it does not provide that those circumstances are a necessary element for liability. *See Butler v. DOC,* 95-0160-PC-ER, 1/14/98: "even though [respondent] avoids the *presumption* that could have been created by the operation of §111.36(3), Stats., that does not resolve the question of liability." P. 17.

Respondent cites *Faragher v. City of Boca Raton,* 524 U. S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 77 FEP Cases 14 (1998), for the proposition that it is a prerequisite for liability that the alleged harassment be perpetrated by a supervisor. However, the harassment in *Faragher* came at the hands of the plaintiff's immediate supervisors, and the Court had no occasion to directly address a question involving sexual harassment by a co-worker. Furthermore, neither that case, nor *Burlington Industries v. Ellerth,* 77 FEP Cases 1 (1998), a companion case which was handed down at the same time as *Faragher,* imply that an employer would not be liable for sex harassment by a co-worker that was proximately caused by the employer's negligence in hiring, training or supervising that employe.

In *Burlington,* the Court looked to the common law of agency in formulating the test for employer liability under Title VII, citing §219(2) of the Restatement (Second) of Agency (1957): "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless the master was negligent or reckless," and commenting as follows:

> Under subsection (b), an employer is liable when the tort is attributable to the employer's own negligence. §219(2)(b). Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII; but [the employe] seeks to invoke the more stringent standard of vicarious liability." 77 FEP Cases at 7.

The Court proceeded with the following discussion which indicates that an employer may be liable for co-worker sex harassment if the employer is negligent:

> We turn to the aided in the agency relation standard. In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. Were this to satisfy the aided in the relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue. . . . see also 29 CFR 1604.11(d) (1997) ("knows or should have known" standard of liability for cases of harassment between "fellow employes.") 77 FEP Cases at 7-8 (case citations omitted)

The administrative rule cited above makes explicit the basis of employer liability in this situation. Section 29 CFR 1604.11(d) provides: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show it took immediate and appropriate corrective action."

This Commission also has indicated that an employer may be liable under the WFEA for sex harassment by a non-supervisory employe on a "should have known" basis: "An employer has a duty, when it knows or should have known of sexual harassment occurring between fellow employes, to take appropriate action to deal with the problem." *Glaser v. DHSS,* 79-PC-ER-63, 7/27/81. Also, a number of federal courts have endorsed this principle in Title VII actions. *See, e. g., Juarez v. Ameritech Mobile Communications, Inc.* 957 F. 2d 317, 58 FEP Cases 152, 154 (7th Cir. 1992) ("An employer is liable for such harassment 'only if the employer knew or should have known about an employe's acts of harassment and fails to take appropriate remedial action.'" (citation omitted); *Hirase-Doi v. U S West,* 69 FEP Cases 1745, 1748 (10th Cir. 1995):

> [T]he district court found that [the harasser] was a non-management, non-supervisory co-worker of Doi who was not acting

> within the scope of his employment when he committed the alleged acts of harassment. Therefore, the district court held, U S West could only be liable if it was negligent or reckless in failing to remedy or prevent a hostile work environment of which management level employes knew or in the exercise of reasonable care should have known. *See Hirschfeld v. New Mexico Corrections Dept.*, 916 F. 2d 572, 576-77 [54 FEP Cases 268, 272] (10th Cir. 1990)

DOC also contends that:

> The complainant does not allege that the respondent knew or should have known that [the alleged harasser] had a propensity to sexually harass the complainant, much less that [he] had in fact sexually harassed the complainant. Accordingly, there can be no direct liability. Respondent's brief, p. 5.

However, complainant's charge of discrimination includes the following allegation:

> Upon information and belief, [the alleged harasser] had sexually harassed other female employes within the Department of Corrections and/or at other jobs he held prior to my complaints. Although this was known to management, nothing was done to prevent him from engaging in further sexually harassing conduct. Management was negligent in hiring him, and/or training him, and/or disciplining him prior to or during the time in which he was harassing me. Discrimination complaint, p.3.

In proceedings before the Commission, pleadings should be interpreted liberally, and are not required to conform to standards governing judicial proceedings. A complaint is not required to set forth the elements of a WFEA claim. *See, e. g., Hawk v. DOCom,* 99-0047-PC-ER, 6/2/99. In any event, it does not appear that the complainant must demonstrate that the employer had knowledge, actual or constructive, that the alleged harasser had a propensity to specifically harass complainant, or had actually harassed complainant. *See Hirase-Doi,* 69 FEP Cases at 1749:

> U S West argues that Doi cannot rely on Coleman's harassment of co-workers to establish that U S West knew or should have known Coleman was harassing Doi. U S West provides no case law in support of this proposition, nor is it a defensible position under the law. We believe that U S West may be put on notice if it learns that the perpetrator has practiced widespread sexual harassment in the office

> place, even though U S West may not have known that this particular plaintiff was one of the perpetrator's victims.
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> In evaluating claims for negligence, proximate cause and forseeability are typically employed to determine the scope of an employer's duty. W. Page Keeton et al, Prosser and Keeton on the Law of Torts Section 42, at 273-74 (5th Ed. 1984). We believe they are useful tools here in determining whether to look broadly at the perpetrator's conduct or narrowly at conduct directed toward the plaintiff only. The extent and seriousness of the earlier harassment and the similarity and nearness in time to the later harassment should be factors in deciding whether to allow the evidence of the harassment of others to prove notice.
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> In Restatement (Second) of Agency Section 213, comment d, the Restatement addresses dangerous employes and emphasizes that employer's liability results if the employer:
>
> > [H]ad reason to believe that an undue risk of harm would exist because of the employment. The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employe, there is liability only to the extent that the harm is caused by the quality of the employe which the employer had reason to suppose would be likely to cause harm.
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> *Id., comment d.* This approach also comports with the purposes of Title VII—prophylactically stopping workplace discrimination in addition to compensating victims. *Albermarle Paper Co. v. Moody,* 422 U. S. 405, 417-18 [10 FEP Cases 1181] (1975).

The concurring opinion written by Judge Flaum in *Jansen v. PCA,* 123 F. 3d 490, 74 FEP Cases 1138 (7th Cir. 1997); affirmed, *Burlington Industries, Inc. v. Ellerth,* 77 FEP Cases 1 (1998); in addressing the issue of employer liability for supervisory harassment, discusses some policy factors that are germane to the issue of whether employers in appropriate cases should be held accountable for sexual harassment by co-workers, even in the absence of knowledge of the particular act of harassment in question:

> While posted policies and grievance procedures are important, I believe that the remedial goals of Title VII demand more. Companies' efforts to deal with sexual harassment should be systemic and proactive, rather than discrete and reactive. We know that companies can implement grievance procedures and discipline wayward employes; but

> we also know that companies can hire, train, and promote employes with an eye toward preventing undesirable behavior. In the abstract, a negligence standard conceivably could account for a company's systemic efforts to promote a workplace free of sexual harassment. Employers who had not done enough to reduce the likelihood of harassment throughout the workplace would be found negligent, even if they had no notice that a specific employe was a harasser. In reality, a negligence standard tends to focus on a company's response to specific instances of harassment. Yet a company's reasonable response to a known harasser is not necessarily indicative of reasonable efforts to prevent harassment from occurring in the first place.

In conclusion, respondent's objection to the complainant's proposed statement of additional issue or sub-issue, as set forth above, is overruled, and this case will proceed to hearing on both the examiner's statement of issue and the proposed additional or sub-issue.

Dated: June 5, 2000.

STATE PERSONNEL COMMISSION

Anthony J. Theodore, General Counsel

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