STATE OF WISCONSIN PERSONNEL COMMISSION

DOUGLAS TESSMAN,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0205-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint alleging sex discrimination and retaliation for engaging in protected whistleblower and fair employment activities in regard to a probationary termination. At hearing, complainant withdrew his allegation of whistleblower retaliation. A hearing was held on June 3, 1999, before Laurie R. McCallum, Chairperson. The parties provided final argument orally at the conclusion of the hearing.

FINDINGS OF FACT

1. During all times relevant to this matter, complainant was employed as a probationary Supervising Officer 2 (Captain) at Oakhill Correctional Institution. Complainant's first-line supervisor was David Lemke, Security Director. As a Captain, complainant was responsible for security at the institution during the shift to which he was assigned.

2. Some time in April of 1998, Sgt. Mary Kelly filed a complaint against complainant alleging harassment, including sexual harassment. This complaint was investigated by respondent's central office staff. The investigation was initiated in May of 1998, and included an investigatory meeting with complainant on May 15, 1998. Complainant was serving as Sgt. Kelly's supervisor at the time.

3. On August 1, 1998, Officer Kussmaul completed an incident report relating information he had learned from an inmate regarding an incident which was the subject of a conduct report. On August 3, 1998, during a meeting in the supervisors' office at which complainant, Officer Kussmaul, Captain Saunders, and Captain Miller were present, complainant held up a copy of this incident report and stated in a loud voice that it was worthless and he didn't understand why it had been prepared. Captains Saunder and Miller reported that complainant used profanity when making these statements to Officer Kussmaul. Complainant was already aware of the information in the report but Officer Kussmaul was not aware of this at the time he prepared the report. Complainant's statements embarrassed Officer Kussmaul. It was the policy at Oakhill to encourage Officers to report information of the type Officer Kussmaul had included in his report. Officer Kussmaul reported the substance of this incident in the supervisors' office to Security Director Lemke on August 6, 1999. Administrative Captain Laliberte conducted investigatory meetings regarding this incident with Captain Saunders on August 10, 1998; with Officer Kussmaul on August 6, 1998; and with Captain Miller on August 15, 1998;

4. In July of 1998, Security Director Lemke assigned complainant to investigate inmate complaints about Sgt. Beals and Sgt. Decker. Complainant was aware of the policy at Oakhill to complete investigations of allegations against staff as soon as practicable. These two investigations assigned to complainant were not complex. On August 13, 1998, Security Director Lemke sent a written reminder to complainant advising him that he had still not received reports of either of these investigations. On August 28, 1998, Security Director Lemke sent complainant another written reminder requiring complainant to advise him of the status of these investigations. On August 31, 1998, complainant wrote to Security Director Lemke that he would finish the investigations by the first week of September. Complainant submitted the report of the first investigation on September 7 and the report of the second investigation on September 15.

5. On September 18, 1998, Security Director Lemke met with complainant to discuss a variety of issues, including those described in findings 3. and 4., above. In

regard to the statements complainant had made to Officer Kussmaul, Security Director Lemke advised complainant that he saw no reason for complainant to have met with Officer Kussmaul in the first place because the incident report seemed perfectly proper and informative, and that it was important to maintain good supervisory/staff relationships, including sensitivity toward others. In regard to the late investigatory reports, complainant admitted he had made a mistake and that the investigations had gotten buried with other paperwork. Security Director Lemke reminded complainant of the importance of timely investigations, particularly those where the work performance of staff is at issue, and advised him that, since neither was a complicated investigation, there was no excuse for the delay.

6. On August 30, 1998, complainant left his office and went to the dining room to eat without taking his radio with him. Complainant was not carrying a beeper or other communication device, and was the captain on duty on the second shift at the time. Sergeant Kelly attempted to contact complainant but did not receive a response. Officer Bondelier, the control officer at the time, located complainant in the dining room, and asked complainant if he had a radio on. Complainant indicated to Officer Bondelier that he wasn't wearing one. Officer Bondelier volunteered to go and get a radio for complainant but complainant told him that he would take care of it. Complainant finished eating before leaving the dining room and obtaining a radio.

7. On August 31, 1998, complainant filed the following with Captain Laliberte by electronic mail:

> Lib, per our conversation on 08/31/98.
>
> On 08/30/98 (Sunday) I left the office without my radio and went down to the dining room to eat. Officer Bondelier told me that I forgot my radio and asked if he should go to the office and get my radio. I told Officer Bondelier that I would get it myself. Later that night I received a phone call from a Sgt. that informed me that Officer Bondelier had told Sgt. Kelly that I didn't have my radio on me. Sgt. Kelly said that she should write me up. Then she said that all she would have to do is tell Capt. Saunders about it because he wants to burn Doug anyway.

> Lib there is one other thing I would like to bring to your attention. A few months ago Mike was in the office doing hearings, I was in there with him, there also was an inmate in the room, as Mike was filling in the blanks a song came on the radio. I did not hear it. Mike said in front of this inmate to me "Hey Doug there playing our song." I didn't know what he was talking about so I asked him. He said there playing our song, "put your head on my shoulder." I think this was very inappropriate and sexual, not knowing what his motive was, and being said in front of an inmate. This is not the only time he has made comments with a sexual overtone. It may be that he was just goofing around but this conduct will not be tolerated any longer.

8. Neither Sgt. Kelly nor Officer Bondelier ever reported complainant's failure to take a radio with him to the dining room on August 30, 1998.

9. Management at Oakhill did not regard complainant's allegation regarding Capt. Saunders as a potentially actionable sexual harassment complaint and, as a result, did not investigate it as such. Capt. Laliberte did discuss the allegation with Capt. Saunders and did indicate in this discussion that such conduct was inappropriate in the workplace. Capt. Saunders indicated that he would not do it again, and later apologized to complainant. Complainant did not at the time of the incident advise Capt. Saunders that he found his conduct relating to the "playing our song" comment objectionable.

10. On August 31, 1998, complainant was present in the squad room with other officers and supervisors when complainant's radio started beeping due to a dead battery. When one of those present pointed this out to complainant, he stated that it was okay, sometimes he didn't wear one, but that he'd heard about that and he was sure he would hear about it again. Complainant then went on to state that he was sure "Mikey" would have to know about this, "he'll want to burn me some more." Complainant was referring to Captain Saunders when he said "Mikey."

11. On September 1, 1998, while complainant, Lt. Caldwell, and Lt. Sproelich were present in the supervisors' office, complainant, in a loud and angry tone, referred to Sgt. Kelly as a "bitch;" and stated that he didn't like Officer Bondelier telling him

what to do and that, if he had anything to say about it, Officer Bondelier would never promote. Lt. Caldwell reported this incident to Captain Laliberte.

12. On numerous occasions, complainant discussed with subordinate staff his differences with management or the substance of discussions which occurred during supervisory meetings. Supervising officers, including complainant, are trained upon hire not to engage in such discussions because it subverts their authority and that of other supervisors. Complainant was reminded about this by his superiors on several occasions, but continued to engage in this conduct. Some of these reminders occurred prior to August 31, 1998.

13. On September 16, 1998, while they were eating in the dining room, complainant asked Lt. Caldwell when she was going to start her rounds. She asked him if he didn't want her to finish writing up the results of inmate hearings first, and complainant replied, "No, they're done. I was doing hearings while you were up polishing someone's floor." Lt. Caldwell told complainant that she had been in a meeting. Complainant said, "Oh, is that what they call it now?" Lt. Caldwell told complainant that he should watch what he was saying. Complainant's comments had been made in a loud tone of voice. At this point in the conversation, complainant and the subordinate officers at the table began laughing. There were inmates present who would have been able to hear the conversation. Lt. Caldwell filed a complaint about this incident with Capt. Laliberte. Capt. Laliberte investigated the incident, and discussed with complainant his concern that such conduct tends to undermine the authority of supervisors and creates morale problems in a correctional setting.

14. On September 30, 1998, at 3:40 p.m., complainant and Captain Laliberte were present on a stairway close to the supervisors' office. Complainant informed Captain Laliberte that he was leaving for the day. Captain Laliberte asked him why and complainant indicated that he had a medical appointment the next morning. Complainant then told Captain Laliberte that he wanted to demote to a sergeant position. When Captain Laliberte asked him why, complainant indicated that he was tired of all the "bullshit" around there. Complainant said this in a loud voice. Captain Laliberte cautioned him to lower his voice and invited him into his office or another

room. Complainant did not make a move to leave the stairway and said that he didn't care. Captain Laliberte reminded complainant that he had to care since there was protocol to follow if you were a supervisor. Complainant responded, "I don't give a fuck. I've had it." Complainant then left the institution. Complainant was scheduled to work until 10:00 p.m. that day. Complainant did not seek or obtain permission to leave the institution. Captain Laliberte reported this incident to Security Director Lemke.

15. Security Director Lemke and Associate Warden Mark Severtson conducted an investigation of the incidents described in findings 6, 10, 11, 12, 13, and 14, above, including complainant's complaint against Capt. Saunders described in finding 7, above. This investigation included an investigatory meeting with complainant on October 2, 1998. In this meeting, when asked why he didn't report the incident of alleged sexual harassment by Capt. Saunders sooner, complainant indicated that he had "overlooked it."; that he thought Capt. Saunders "was making a joke." During this investigatory meeting, complainant mentioned one other incident of sexual harassment involving Capt. Saunders, i.e., that, when complainant mentioned that he and Capt. Saunders would be taking the golf cart to the kitchen, Capt. Saunders said something to the effect that he would drive if complainant put his arm around Capt. Saunders' shoulder.

16. In a memo to Oakhill Warden Catherine Farrey dated October 7, 1998, Security Director Lemke summarized the findings of the investigation, and recommended that complainant's promotional probation be ended and that he be demoted to his previous rank due to failure to meet probationary standards.

17. As a result of this recommendation, a meeting was conducted on October 26, 1998, at which complainant, Warden Farrey, Security Director Lemke, and Lt. Rodney James were present. Complainant was given an opportunity at this meeting to offer information relating to each of the incidents which had been investigated, and to the quality of his work performance in general.

18. In a letter to complainant dated October 27, 1998, Warden Farrey advised that he was being removed from his position as a Supervising Officer 2 and restored to an Officer 3 position.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to show that he was discriminated against on the basis of his sex or retaliated against for engaging in protected fair employment activities.

3. Complainant has failed to sustain this burden.

OPINION

Before hearing, the parties had agreed to the following statement of the issue:

> Whether respondent discriminated against complainant on the basis of sex and/or retaliated again complainant for engaging in fair employment and whistleblower activities, as set forth in his amended complaint of discrimination, with respect to its decision to remove complainant from his position as Supervising Officer 2 during his probationary period.

At hearing, the complainant withdrew his allegation of whistleblower retaliation.

Complainant's allegation of sex discrimination is that he was sexually harassed by a co-worker, and that his complaint of sexual harassment was not investigated as promptly as a similar complaint filed by a female supervisor.

The Fair Employment Act (FEA), Ch. 111, Subch. II, Stats., specifies that actionable sexual harassment consists of the following:

> §111.32(13) "Sexual harassment" means unwelcome 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.

§111.36 (1) 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: . . .

(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.

(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.

In cases such as this one, the proper standard is whether the allegedly harassing conduct is sufficiently severe or pervasive as to alter the conditions of employment for the alleged victim.

Here, complainant brought to respondent's attention on August 31, 1998, only a single incident of alleged harassment. During his investigatory meeting on October 2, 1998, complainant mentioned one other similar incident. Also at this meeting, complainant acknowledged that he had waited several months to report his concerns about the conduct of Capt. Saunders because he had "overlooked" it and had thought that Capt. Saunders was making a joke. The record does not show that complainant expressed to Capt. Saunders at the time the incidents occurred or thereafter that such conduct was unwelcome. The sexual overtone of these two incidents certainly does not rise to the level of severe conduct. Two minor incidents occurring over a period of months does not satisfy the requirement that the conduct be pervasive. *See, Oncale v. Sundowner Services, Inc.*, 118 S. Ct. 998 (1998) (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.); *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.); *Bruflat v. DOCom*, 96-0091, 96-0042, 97-0070-PC-ER, 7/7/98, (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.); *Winter v. DOC*, 97-0149-PC-ER, 5/6/98, (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.); and *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98, (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.) Complainant has failed to show that the conduct complained of constituted sexual harassment within the meaning of the Fair Employment Act.

Even if the conduct had risen to the level of sexual harassment, Administrative Captain Laliberte discussed it with Capt. Saunders after receiving complainant's memo on August 31, 1998, and advised him that it was inappropriate conduct in a work setting. The fact that respondent did not regard complainant's description of the objectionable conduct as meriting an investigation consistent with its sexual harassment policy is consistent not only with the nature of the complaint but also with complainant's attitude toward the incidents which he admitted to overlooking and to regarding as a joke. It is concluded that the Capt. Saunders' conduct did not constitute sexual harassment within the meaning of the FEA, and that respondent took timely and effective action to attempt to correct the conduct once complainant brought it to a supervisor's attention.

The sexual harassment complaint with which complainant compares his was filed by Sgt. Mary Kelly against complainant. Sgt. Kelly's complaint was not similar to complainant's, however, in that it alleged multiple unwelcome acts of harassment by a male supervisor against a female subordinate. These distinctions justified the different manner in which the two complaints were investigated, and it is concluded as a result that this difference did not result from sex discrimination.

Complainant also alleges that respondent retaliated against him for filing a complaint of sexual harassment by terminating his promotional probation. To establish a prima facie case in the retaliation context, there must be 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's memo to Capt. Laliberte of August 31, 1998, qualifies as a protected activity; he suffered an adverse employment action when his promotional probation was

terminated; and it can be inferred from the close proximity in time between the two that a causal connection exists. Complainant has established a prima facie case of fair employment retaliation.

The burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for complainant's termination. Respondent's proffered rationale is that complainant was terminated for poor work performance which is legitimate and non-discriminatory on its face.

The burden then shifts to complainant to demonstrate pretext. Complainant has failed to do this. It should first be pointed out that respondent had brought several concerns regarding complainant's performance (See Findings of Fact 3, 4, and 12, above) to his attention prior to August 31, 1998. Moreover, those examples of poor work performance cited by respondent which occurred after August 31 represented serious failings by a supervisor in a correctional institution. In particular, they represent complainant, as the officer in charge of Oakhill, being out of communication with the rest of the institution (Finding 6, above); referring, in front of other supervisors, to a subordinate officer as a "bitch" and threatening to interfere with the promotion of a different subordinate officer because complainant mistakenly assumed that they had reported his failure to have a radio in his possession (Finding 11, above); continuing to share information intended only for supervisors with subordinate officers despite having been counseled numerous times (See Finding 12, above); embarrassing another supervisor in front of subordinate officers by making a demeaning joke at her expense (Finding 13, above); using loud profanity when speaking to a superior officer in an open area (Finding 14, above); and leaving the work site more than six hours before the end of his shift without seeking or obtaining permission (Finding 14, above). Finally, complainant has failed to show that any other probationary Supervising Officer 2 (Captain) with a record of work performance comparable to his passed a promotional probation. Complainant has failed to show that he was retaliated against as alleged.

ORDER

This complaint is dismissed.

Dated: August 11, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM
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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