STATE OF WISCONSIN PERSONNEL COMMISSION

S[redacted] K. D[redacted]
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON
Respondent.

RULING ON MOTION TO DISMISS

Case No. 99-0018-PC-ER

This is a complaint of age discrimination and retaliation for engaging in protected whistleblower and fair employment activities. On August 13, 1999, respondent filed a motion to dismiss for failure to state a claim. On October 8, 1999, complainant filed an amendment to her original complaint in this matter. As a consequence, respondent was provided an opportunity to amend its motion. The parties were permitted to brief the original motion and this motion as amended and the schedule for doing so was completed on November 19, 1999. The following findings 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 alleges the following as the factual bases for the charge in her original complaint:

a. A supervisor interrupted a September 1998 meeting to ask complainant, who was then engaged in a conversation with another employee, if she had anything to add.

b. During the last week of November 1998, complainant's supervisors solicited negative comments about her from certain of her co-workers.

c. On December 1, 1998, respondent relocated complainant's office and restricted her access to her former work site.

2. Complainant alleges age discrimination in regard to 1.a., and fair employment and whistleblower retaliation in regard to 1.a., 1.b., and 1.c.

3. Complainant alleges the following as the factual bases for the charge in her amendment to the original complaint:

> a. Complainant was notified that she was the subject of a predisciplinary hearing to be held on October 7, 1999, and that one of the subjects of this hearing was an incident which occurred on September 16, 1999, involving complainant and Chuck Krueger. [In the brief she filed on November 19, 1999, complainant indicated that this predisciplinary meeting, as well as an investigatory meeting, were held on October 18, 1999, and that she subsequently received a written reprimand and job instruction as a result of these meetings. As a result of this additional related information from complainant as well as the procedural history of this matter, **the factual basis of this charge (3.a.) is deemed to have been amended to include these meetings and the resulting written reprimand and job instruction.**]
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> b. Co-worker Tim Galbraith filed a grievance against complainant relating to her conduct towards him at the work site.

4. Complainant alleges age discrimination as well as fair employment and whistleblower retaliation in regard to 3.a. and 3.b.

5. Allegation 3.a. is not included within the scope of the instant motion.

6. Respondent contends in its motion, in regard to 1.b., above, that complainant's co-workers brought concerns about certain office conduct of complainant's to the attention of complainant's supervisors who then asked these co-workers to put their concerns in writing. Complainant did not dispute this version of events in her brief on the motion.

7. Respondent contends in its motion, in regard to 3.b., that Mr. Galbraith did not file a grievance against complainant but instead cited concerns relating to her interactions with him as one of the reasons for his resignation. Complainant did not dispute this version of events in her brief on the motion.

8. The relocation of complainant's office and the restrictions on her access to her former work site means she must telephone certain individuals to obtain work-

related information that she formerly obtained through informal office discussions. This change, however, does not mean she no longer has access to information needed to perform her job.

Respondent contends here that complainant has failed to state a claim for relief since the alleged discriminatory actions, i.e., 1.a. and 3.b., above, do not qualify as adverse employment actions within the meaning of the Fair Employment Act (FEA); and since the alleged retaliatory actions, i.e., 1.a., 1.b., 1.c., and 3.b., above, do not qualify as adverse employment actions within the meaning of the FEA or as disciplinary actions within the meaning of the whistleblower law.

> The general rules for deciding this kind of motion are:
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> [T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances 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.
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> . . . A claim should not be dismissed . . . unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.

Phillips v. DHSS & DETF, 87-0128-PC-ER, 3/15/89 (quoting *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979) (citations omitted)); affirmed, *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

In order to prevail on a claim of discrimination or retaliation under the FEA, a complainant is required to show that he or she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97. In the context of a retaliation claim, §111.322(3), Stats., makes it an act of employment discrimination "[t]o discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment

discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment . . . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment."

The applicable standard, if the subject action is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the complainant's employment status. *Klein, supra,* at 6. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2. In *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996), the court stated as follows:

> Adverse employment action has been defined quite broadly in this circuit. *McDonnell v. Cisneros,* . . . 84 F.3d 256, 70 FEP Cases 1459 (7th Cir. 1996). In some cases, for example, when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purpose. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Collins v. State of Illinois,* 830 F.2d 692, 703, 44 FEP Cases 1549 (7th cir. 1987). . . .
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> While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 70 FEP Cases 1639 (7th Cir. 1996).. . . . [I]n *Flaherty v. Gas Research Institute*, 31 F.3d 451, 65 FEP Cases 941 (7th Cir. 1994), we found that a lateral transfer, where the employee's existing title would be changed and the employee would report to a former subordinate, may have caused a "bruised ego," but did not constitute an adverse employment action. Most recently, in *Williams*, we found that the strictly lateral transfer of a salesman from one division of a pharmaceutical company to another was not an adverse employment action. . . .
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> The dispositive question in our case is not whether Vivian's [Smart's] performance evaluations were undeservedly negative, but whether even

> undeserved poor evaluations can alone constitute the second element of her prima facie case. . . .
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> There is little support for the argument that negative performance evaluations alone can constitute an adverse employment action. There are certainly cases where allegedly undeserved performance evaluations have been presented as evidence of discrimination on the basis of sex or age. But Vivian has not identified, nor have we discovered, a single case where adverse performance ratings alone were found to constitute adverse actions. . . .
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> Looking to the facts of the case before us, in the light most favorable to Vivian, we can only conclude that the evaluations alone do not constitute an actionable adverse employment action on the part of Ball State. Vivian was in training, and the evaluations were characteristic of a structured training program. They were facially neutral tools designed to identify strengths and weaknesses in order to further the learning process.

In *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993), the court ruled that an employee did not suffer an adverse employment action as the result of a lateral transfer from assistant vice president and manager of one branch of a bank to a loan officer position at a different branch with the same salary and benefits. The court, in requiring that an actionable employment consequence be "materially adverse," stated:

> A material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

See, Rabinowitz v. Pena, 89 F.3d 482 (7th Cir. 1996) (plaintiff failed to establish prima facie case of retaliation under Title VII - lower performance rating and work restrictions were, at most, mere inconveniences, not adverse employment actions); *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994) (lateral transfer resulting in title change and employee reporting to former subordinate may have caused

"bruised ego" but did not constitute adverse employment action); *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989) ("humiliation" claimed by school principal to result from transfer to another school did not constitute adverse employment action because "public perceptions were not a term or condition" of plaintiff's employment).

Here, the only acts of alleged age discrimination are the comment made to complainant by one of her supervisors during a meeting asking whether she had anything to add, i.e., allegation 1.a., above, and a comment made by a co-worker to management attributing certain of complainant's interactions with him as one of the reasons for his resignation, i.e., allegation 3.b., above. The first of these does not come close to the standard of having a "concrete, tangible effect" on complainant's employment status; and the second is not attributable to respondent and, under the circumstances present here, cannot be imputed to respondent as a result.

In regard to the allegations of fair employment retaliation, the analysis of 1.a. and 3.b. would parallel the analysis of these allegations in the context of age discrimination, above. In regard to the allegations other than 1.a. and 3.b., even if complainant's version of events is accepted as true, they do not rise to the level of adverse employment actions. If a negative performance evaluation does not in and of itself constitute an adverse employment action, (see, *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99; *Smart, supra*,) then certainly the solicitation or acceptance of negative comments from an employee's co-workers, standing alone, does not rise to that level. Similarly, if the lateral transfer of an employee to a different branch or school or position does not constitute an adverse employment action (*Crady, Flaherty, Spring, supra*), then it stands to reason that a physical move to an equivalent nearby office does not either. In addition, interference with complainant's receipt of some work-related information through informal discussions is not sufficiently adverse to equate with the examples of adverse employment actions provided by the Commission and the courts, e.g., termination, demotion accompanied by a decrease in pay, material loss of benefits, or significantly diminished material responsibilities.

Finally, in regard to the FEA allegations, complainant appears to allege that they constitute harassment based on her age or in retaliation for protected fair employment activities. However, actionable harassment contemplates unwelcome verbal or physical conduct directed at an employee based on his or her protected status, and that this conduct is pervasive and severe. *See, Smith v. UW*, 93-0173-PC-ER, 4/17/95; and *Laber v. UW-Milw*, 81-PC-ER-143, 11/28/84. The only action which complainant alleges here which could possibly be considered as constituting unwelcome verbal or physical conduct directed at complainant is 1.a. , i.e., the incident in which a supervisor interrupted a meeting to ask complainant if she had anything to add. This does not come close to rising to the level of severity or pervasiveness required for an actionable harassment claim.

Respondent also argues that complainant has failed to state a claim of whistleblower retaliation. Section 230.80(8), Stats., defines a retaliatory action within the context of a whistleblower claim as a "disciplinary action" which is further defined as "any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to . . . 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." Sections 230.80(2) and (2)(a), Stats. The Commission has held that an action which is not one of those listed in this definition must have a substantial or potentially substantial negative impact on an employe in order for it to be considered a penalty within the meaning of §230.80(2), Stats. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88.

It is assumed for purposes of this analysis that complainant is contending here that the comment made to her by a supervisor during a meeting in which she was asked whether she had anything to add constituted verbal harassment within the meaning of §230.80(2), Stats. However, as concluded above, an isolated comment of this nature does not come close to reaching the level of severity or pervasiveness required for a finding of verbal harassment.

The solicitation of negative comments from co-workers is not one of the actions listed in the statute. As a consequence, the inquiry becomes one of determining whether it has a substantial or potentially substantial negative impact on an employe comparable to the impact of the listed actions. Although such conduct, if true, could be evidence of an intent to discriminate or unfairly discredit, the action itself is not a penalty. Such an action is more closely akin to a decision to investigate an incident of alleged misconduct which has been held by the Commission not to constitute a penalty within the meaning of the whistleblower law. *Bruflat v. DOComm*, 96-0091-PC-ER, etc., 7/7/98.

Another allegation of whistleblower retaliation relates to respondent's relocation of complainant's office and imposition of restrictions on her access to her former work site. In *Vander Zanden, supra,* the Commission held that an employer's restrictions on complainant's access to a particular work location in another unit did not rise to the level of a penalty. Here, even though complainant alleges that the restriction imposed by respondent interfered with her ability to obtain work-related information, she does not allege, nor does it logically follow from the nature of the restriction, that it interfered to any significant degree with her ability to perform the duties and responsibilities of her position. *See, Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98. In *King v. DOC*, 94-0057-PC-ER, 3/22/96, the Commission held that moving the complainant to a different workstation did constitute a penalty within the meaning of the whistleblower statute. However, this holding relied on the fact that complainant felt and communicated to respondent that the association of the new workstation with a fellow employe to whom she had developed an aversion could significantly affect her health and her mental and physical ability to function in her job. This factor is not present here and it is concluded as a result that the relocation of complainant's work site does not constitute a penalty given the present circumstances.

The final act of alleged whistleblower retaliation is the comment allegedly made by a co-worker to the effect that certain conduct of complainant's was one of the reasons for his resignation. Not only does this not rise to the level of a "disciplinary

action" comparable to those cited in the statute, but complainant fails to explain how this action should be attributed to respondent.

ORDER

The respondent's motion is granted and this case is dismissed as to allegations 1.a., 1.b., 1.c., and 3.b. The sole remaining allegation is 3.a., as amended, which relates to investigatory and predisciplinary meetings held on October 18, 1999, and the resulting written reprimand and job instruction.

Dated: December 3, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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