STATE OF WISCONSIN PERSONNEL COMMISSION

THOMAS R. MCKAY,
Complainant,

v.

Director, STATE HISTORICAL SOCIETY OF WISCONSIN,
Respondent.

Case No. 00-0094-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission to resolve respondent's motion to dismiss, which was filed with the Commission January 25, 2002, following complainant's appeal of a no probable cause finding on the issue of sex discrimination. Respondent seeks dismissal of this complaint on the ground that complainant has failed to establish an element of his prima facie case, an adverse employment action, and therefore failed to state a claim on which relief may be granted. The findings that follow are based on apparently undisputed facts and are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1 At all times relevant to this matter, complainant was employed by respondent in a position with the working title of Local History Coordinator within the Office of Local History.

2. On February 28, 1996, a female intern (JM) filed a complaint with respondent alleging that complainant had harassed her A formal investigation was not conducted but two informal meetings were held and complainant was required to attend sensitivity training.

4. Some time in August or September of 1998, soon after respondent rehired EDN, who is female, EDN and complainant went to lunch. During the course of conversation while at lunch, personal questions and comments were discussed.

5. On April 29, 1999, EDN filed a complaint of harassment against complainant. At the time, the top two positions in respondent's Office of Human Relations were vacant, and

Robert Thomasgard, respondent's Associate Director, was serving as the acting Human Relations Director. On May 28, 1999, Thomasgard assigned Betsy Trane, Administrative Policy Advisor in the Director's office, to conduct the investigation, and complainant indicated he had no objection to the selection of Trane.

6. Trane conducted an extensive investigation, interviewing 11 witnesses, including complainant and EDN, and reviewing documents. Trane completed her report June 21, 1999. The report pointed out that there were inconsistencies among the witnesses as to certain facts but that, "[a]llegations of complainant EDN were in large measure factual;" that the available facts did not indicate that complainant's behaviors reached the threshold level of sexual harassment; that the facts did indicate that complainant's behaviors were troubling and needed remedial action; and that lack of knowledge about sexual harassment by lead workers and supervisors, and the absence of two senior SHS personnel staff contributed to the situation not being resolved at an earlier stage.

7 Respondent's investigation of EDN's complaint generally followed established procedures, but failed to satisfy certain time requirements. This failure resulted in large part from the vacancies referenced in ¶5, above.

8. Based on Trane's report, Thomasgard and George Vogt, respondent's Director, issued a written reprimand to complainant on October 22, 1999, after conducting a prediscliplinary meeting on October 15, 1999. Complainant grieved the reprimand through the process established by the applicable collective bargaining agreement. Respondent denied the grievance at each step, and it has not been taken to arbitration by complainant's collective bargaining representative.

9. Respondent failed to provide timely responses to requests for information from complainant relating to its investigation of EDN's complaint and its results.

10. Complainant alleges that David Seligman, respondent's Director of Administrative Services, stated to him "there would have been no basis for harassment except the [sic] I (McKay) was a man and she [EDN] was a woman." Respondent represents that Seligman denies making this statement.

11. Respondent's policy manual uses as its definition of sexual harassment the definition set forth in §111.32(13), Stats., and states this definition as follows:

> [S]exual harassment means unwelcome sexual advances, unwelcome physical contacts of a sexual nature, or unwelcome verbal or physical conduct of a sexual nature. Unwelcome verbal or physical conduct of a sexual nature includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials.

12. Respondent uses the following as its definition of "general harassment" in its policy manual.

> The general issue of harassment as covered in the Department of Employment Relations' Division of SHSW's Affirmative Action standards follow:
>
> > "Harassment by supervisors or co-workers on the basis of race, sex, national origin, age, disability, or other protected status is an unlawful employment practice prohibited by the Department of Employment Relations. Harassment on the basis of any protected status in service delivery is also prohibited by the Department." The Affirmative Action policy includes a statement that harassment will be prevented and eliminated.

13. Respondent's Affirmative Action Policy as stated in its policy manual (page 9.3) is to provide an environment in which employees are free to work and learn, individually and collectively, to the benefit of SHS's mission and with personal and professional dignity; and to forbid its employees to harass any person due to his or her protected status.

14. Complainant's appeal letter, filed December 3, 2001, states that "the complainant has never alleged sexual harassment. The complaint against the SHSW is discrimination based on sex."

15. Respondent provided information relating to two other complaints filed by female employees alleging harassment by male employees. Respondent initiated a formal investigation of DW after receiving a complaint from HH but did not complete this investigation because DW resigned after discipline was imposed on him due to his absence from work without notice. Respondent conducted a formal investigation of the complaint filed against TC and, although no discipline was imposed, restrictions were placed on TC's access to and use of certain parts of the building and certain equipment.

OPINION

Respondent argues the present complaint should be dismissed because the complainant has failed to establish that respondent engaged in an adverse employment action, and therefore has failed to allege a prima facie case of sex discrimination. Respondent contends the written reprimand does not constitute an adverse employment action for which relief can be granted.

The general rules for consideration of a motion to dismiss for failure to state a claim for relief are set forth in *Phillips v. DHFS & DETF*, 87-0128-PC-ER, 3/15/89; aff'd other grounds, *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d. 205, 482, N.W 2d 121, (Ct. App. 1992), as follows:

> For the purpose of testing whether a claim has been stated 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 the plaintiff to set out in the complaint all the facts, which must eventually be proved 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 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.
>
> . 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. (Citations omitted.)

Accordingly, the Commission accepts as true for purposes of deciding this motion all the facts alleged in the complaint, as well as the facts alleged in opposition to the motion to dismiss.

I. Written Reprimand

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 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 materially adverse 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.

There has not been a general consensus on the proper definition of an adverse employment action. In general, the Seventh Circuit Court of Appeals has not required that an action be an easily quantifiable one such as a termination or reduction in pay in order to be considered adverse, *Collins v. State of Illinois,* 830 F.2d 692, 703, 44 FEP Cases 1549 (7th Cir. 1987), but has concluded that not everything that makes an employee unhappy is an actionable adverse action, *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir 1996). In *Crady v. Liberty Nat'l Bank & Trust Co.,* 993 F.2d 132, 136 (7th Cir. 1993), 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 a "bruised ego" but did not constitute an 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).

In *Krause v. La Crosse*, 246 F. 3d 995 (7th Cir. 2001), the court determined that a letter of reprimand and relocation of a work space, which the plaintiff had repeatedly requested, were not considered adverse employment actions. In the *Krause* case, the record demonstrated the plaintiff had not suffered any job loss or demotion, but, in fact, was still employed by the defendant, and had been given a raise. *Id.* at 1000.

In *Foust v. City of Oshkosh Police Department*, LIRC, ERD 9200216, 8/9/98, the Labor and Industry Review Commission (LIRC) found that complainant's receipt of a supervisor's log entries for a violation of being in the records room without obtaining permission, though not considered a formal means of discipline, constituted a written notation of an officer's deficiencies, which would be placed in an officer's file, and could be grieved through the union. Therefore, the supervisor's logs were properly characterized as disciplinary in nature and could be considered an adverse employment action. *Id.* In *Muenzenberger v. County of Monroe, Department of Human Services*, LIRC, ERD 199400291 & 199404027, 8/13/98, LIRC again addressed the issue of an adverse employment action, finding a performance evaluation constituted a permanent record of poor performance, which could have adverse ramifications throughout a worker's employment. Citing *Foust,* LIRC stated it was not bound by the Seventh Circuit's interpretation of Title VII when applying the WFEA, explaining that informal discipline, such as a supervisor's log, constituted an actionable adverse employment action. *Id* at 4. Therefore, the negative performance evaluation as alleged in *Muenzenberger*, *may* constitute an adverse employment action and may form the basis for a discrimination complaint. *Id.* LIRC went on to explain that in *Muenzenberger*, the harm to complainant was not limited to having received a poor evaluation but that she also suffered the loss of a tangible job benefit in that she was denied a salary increase as a direct result of the evaluation. *Id.*

The Personnel Commission has analyzed the issue of adverse employment action in several cases. In *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99, a satisfactory performance evaluation was linked to the eligibility for a merit pay increase. The Commission found that the tangible impact on complainant's pay resulted in a conclusion that the unsatisfactory performance evaluation was an adverse employment action within the meaning of the FEA.

In the present case, complainant received a written reprimand following an investigation of alleged harassment. In *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97, complainant alleged he was retaliated against for engaging in fair employment activities when respondent investigated him for a possible work rule violation. The only disputed element of a prima facie case involved the question of whether there was an "adverse employment action." *Id.* at 5. Most relevant to the present motion was the ruling on a motion for summary judgment in *Klein*, dated December 20, 1995, with the pertinent language reiterated in the final decision. Specifically, the Commission stated:

> [T]he allegations in this case involve more than the employer conducting an investigation, or contemplating the imposition of discipline. The letter directing complainant to appear at a meeting to discuss a possible work rule violation can be construed as accusatory or even judgmental Complainant alleges that respondent failed to follow established policies for handling disciplinary matters. Even though it appears to be undisputed that no formal discipline ensued, it cannot be concluded that there is no way the letter from respondent and the ensuing handling of the matter by management did not and could not have an adverse effect on appellant's conditions of employment . Whether or not it actually did or could have an adverse effect is a question that will have to await the development of a more complete record. Ruling on motion to dismiss, December 20, 1995, p. 3 (footnote omitted). *Klein v. DATCP*, 95-0014-PC-ER 5/21/97 p. 5

In its ruling, the Commission stated, " . . it cannot be concluded on a motion to dismiss that under no set of circumstances could this complaint state a claim upon which relief could be granted."

Another factor the Commission considers is the comparison to the whistleblower law (sub. III, ch. 230, stats.). The definition of discriminatory action in that law (which, unlike the WFEA, applies only to the state as employer, s. 230.80(4), Stats.) is more extensive than that in the WFEA. The former defines "disciplinary action" in two tiers of gravity, ss. 230.80 (2), 230.85(6), Stats., and specifically includes a "reprimand" in the more serious bracket, s. 230.80(2)(a), Stats., along with "[d]ismissal, transfer, removal of any duty assigned to the employee's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay." *Id.* This indicates the legislature's recognition that in state service a reprimand is serious matter Also, the Commission relies on its collective experience that a

reprimand can have a significant negative impact on a state employee, including the employee's advancement and progressive discipline of the employee, particularly for someone in a position like complainant's. Therefore, notwithstanding the conclusion to the contrary in the initial determination, the Commission concludes in the context of deciding this motion to dismiss for failure to state a claim, that the written reprimand following the harassment investigation qualifies as an adverse employment action.

II. Other Allegations

In addition, complainant alleges he was denied due process by respondent's handling of the investigation of EDN's sexual harassment complaint, subsequent disciplinary actions, and the grievance procedures. Respondent contends in its reply brief that the Commission does not have subject matter jurisdiction over a claim of due process violation. The Commission has an obligation to construe complainant's pro se pleadings flexibly and in a liberal manner. *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 30, 505 N. W 2d 462 (Ct. App. 1993). When the complaint and the brief in opposition to the motion to dismiss are read in conjunction, the Commission believes that complainant is alleging that respondent denied him due process *because of his gender*, and orchestrated the process of handling the harassment complaint, the discipline imposed on complainant, and his subsequent grievance in order to create stress for him *because of his gender* For example, the complaint includes the following:

> [T]he Society extended its investigating and disciplinary actions beyond all reasonable time periods to make the workplace as uncomfortable for me as possible. It even timed each of its actions up to the letter of reprimand to coincide with a Friday to be upsetting to me on time away from work. I believe that the Society acted purposefully to use gender as a pretense in an unfair disciplinary action to create a hostile work environment for me in hopes I would leave my job.

The situation before the Commission is not the clearest because complainant makes a number of general allegations (e. g., complainant argues in his brief that respondent "failed to follow its own written guidelines in conducting its investigation of McKay") along with a number of specific allegations (e. g., complainant argues in his brief that respondent "failed to provide McKay with a first step grievance hearing"). In order to provide adequate notice of the

allegations that will be the subject of the hearing, s. 227.44(2), Stats., complainant will be required to submit a statement of the specific acts of alleged discrimination that comprise his claim in addition to the written reprimand.

CONCLUSIONS OF LAW

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

2. Complainant's charge of discrimination, as liberally construed above, does not fail to state a claim.

3. Respondent's motion to dismiss must be denied.

ORDER

Respondent's motion to dismiss is denied. Complainant will have 30 days from the date of entry of this order to file with the Commission and serve on respondent a recitation of the specific acts, other than the written reprimand, which comprise his complaint of gender discrimination. This matter will be scheduled for a prehearing conference.

Dated: July 16, 2002 STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

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KELLI S. THOMPSON, Commissioner