STATE OF WISCONSIN PERSONNEL COMMISSION

KATHERINE THOMPSON,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 00-0122-PC-ER

RULING ON MOTIONS TO DISMISS

This is a complaint alleging discrimination based on color, race, and marital status, and retaliation for engaging in protected fair employment activities. On December 15, 2000, and January 6, 2001, respondent filed motions to dismiss for untimely filing and for failing to state a claim for relief. The parties had an opportunity to brief these motions. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. This complaint was filed on September 6, 2000.

2. This complaint relates solely to the following incidents:

(a) on November 8, 1999, complainant's husband was allegedly not permitted to accompany her to a hospital for treatment of a medical emergency;

(b) in February and August of 2000, complainant's supervisor allegedly stated several times that she did not like complainant.

OPINION

Respondent argues that complainant's allegation of discrimination/retaliation relating to the incident of November 8, 1999, was not timely filed; and that this case

should be dismissed for failure to state a claim for relief since none of the allegedly discriminatory/retaliatory actions, either individually or as a group, qualify as adverse employment actions or as actionable harassment.

This action was brought pursuant to the Fair Employment Act, which requires that a complaint be filed with the Commission no more than 300 days after the alleged discrimination/retaliation occurred. §111.39(1), Stats. This 300-day filing requirement is in the nature of a statute of limitations and, as a result, subject to equitable tolling. *Milwaukee Co. v. LIRC*, 113 Wis.2d 199, 205, 335 N.W.2d 412 (Ct.App. 1983). An incident which occurred outside the 300-day filing period may be considered timely filed under a continuing violation theory if appropriately linked to an actionable incident which occurred within the filing period. *See, Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98. Complainant has the burden to show that her complaint was timely filed. *See, Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96.

Here, the 300th day after November 8, 1999, was September 3, 2000, which was a Sunday September 4, 2000, was a state holiday and the Commission's offices were not open to receive a filing that day September 5, 2000, was a work day and the date by which complainant's charge relating to the November 8, 1999, incident, was required to be filed in order to be considered timely Complainant did not file her charge until September 6, 2000. However, the incident of November 8, 1999, could arguably be linked under a continuing violation theory, and rendered timely filed as a result, to the incidents of February and August of 2000, which did occur during the 300-day filing period. It is, however, not necessary to resolve this timeliness issue in view of the Commission's conclusion below that the alleged incidents of discrimination/retaliation do not constitute adverse employment actions or harassment.

The general rules for deciding a motion to dismiss for failure to state a claim for relief are:

> [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.
>
> 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).
>
> 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.

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.

Here, the only acts of alleged discrimination/retaliation relate to the denial of complainant's request that her husband accompany her to the hospital in order for her lacerated thumb to be treated, and comments made by complainant's supervisor on two occasions that she didn't like complainant. None of these, either alone or in

combination, come close to the standard of having a "concrete, tangible effect" on complainant's employment status. *See, Dewane v. UW-Madison,* 99-0018-PC-ER, 12/3/99.

Finally, complainant appears to allege that the incidents upon which her charge is based constitute harassment based on her race, color, or marital status 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 actions which complainant alleges here which could possibly be considered as constituting unwelcome verbal or physical conduct directed at complainant are the comments allegedly made by her supervisor on two occasions to the effect that she did not like complainant. These comments do not come close to rising to the level of severity or pervasiveness required for an actionable harassment claim.

CONCLUSIONS OF LAW

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

2. Respondent has the burden to show that complainant failed to state a claim for relief.

3. Respondent has sustained this burden.

ORDER

Respondent's motion to dismiss is granted and this complaint is dismissed.

Dated: May 9, 2001

STATE PERSONNEL COMMISSION

/s/
LAURIE R. McCALLUM, Chairperson

LRM:000122Crul1

/s/
JUDY M. ROGERS, Commissioner

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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