STATE OF WISCONSIN PERSONNEL COMMISSION

CHRISTA COURCHANE,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 01-0100-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 on October 3, 2001. Both parties were afforded the opportunity to file briefs.

FINDINGS OF FACT

1. Complainant was hired by respondent as a Limited Term Employee (LTE) on November 6, 2000, for the position of Program Assistant 2. The maximum number of hours that could be worked in this appointment was 1043, pursuant to §ER10.01, Wis. Adm. Code.

2. On May 15, 2001, complainant's co-worker, Mr. Lloyd Bethke, came to complainant's work station and handed her a note that contained sexually explicit statements.

3. On May 16, 2001, complainant showed the note to Mr. Daniel Okpala, the Technical Services Section Chief.

4. On May 16, 2001, the note was reviewed by Mr. Okpala and Spring Sherrod, Supervisor of the Human Resources Unit in the Business Services Section.

5. Mr. Bethke was instructed not to have contact with complainant.

6. Ms. Sherrod was given the responsibility of conducting an investigation of the complaint that Mr. Bethke had violated respondent's policy against sexual harassment in the workplace.

7 Sometime following complainant's filing of the complaint with respondent, the complainant was assigned to a new project. The parties dispute where complainant's new work station was located with respect to Mr. Bethke's desk.

8. On June 4, 2001, Mr. Bethke sent an e-mail to complainant asking her if she had been informed that he was not allowed to have contact with her or talk to her.

9. On June 4, 2001, Mr. Bethke e-mailed/forwarded an e-mail to complainant, which displayed a picture of a mother cat and kitten.

10. Complainant informed Ms. Sherrod of the e-mails she had received from Mr. Bethke. Mr. Bethke was questioned about the e-mails and again directed not to have any contact with complainant.

11 On June 19, 2001, complainant filed this complaint with the Commission alleging discrimination and harassment on the basis of sex and retaliation for activities protected by WFEA. Specifically, complainant alleges she was given a note which contained sexually explicit language. She told a Ms. Spring Sherrod, with respondent's Employee Assistance Program and a supervisor, who allegedly laughed about the note. Complainant also alleged that respondent retaliated against her by changing her work location, and created a hostile work environment.

12. In a letter dated July 3, 2001, Mr. Bethke was informed that a disciplinary action was being taken against him for violating DOT's workrule 1.1, "Work Performance-Insubordination (including disobedience, failure, or refusal to follow written or oral instructions of supervisory authority, or to carry out work assignments)"

13. Mr Bethke served a disciplinary suspension from July 9, though July 20, 2001.

14. Mr Bethke submitted a letter of resignation dated July 26, 2001.

15. On July 30, 2001, complainant completed 1043 hours in her LTE appointment and the position expired.

16. On October 5, 2001, complainant filed a second complaint, 01-0168-PC-ER with the Commission alleging she was terminated in retaliation for having pursued activities protected by the WFEA.

OPINION

The respondent argues the complaint should be dismissed on the ground that it is moot because the complainant and Mr. Bethke are no longer employed by respondent. The respondent cites the Commission's rulings in *Burns v. UW*, Case No. 96-0038-PC-ER, 4/8/98, and *LaRose v. UW-Milwaukee*, Case No. 94-0125-PC-ER, 4/2/97, as support for their motion.

Complainant disputes respondent's argument that the present complaint is moot by asserting that she is seeking not only attorney fees, but also a determination that she was retaliated against by respondent after she complained to her supervisors about Mr. Bethke. In addition, complaint agues that it is reasonable to infer that she would have continued in her employment with respondent, such that her initial complaint is not moot on the ground that she is no longer employed by respondent.

It is undisputed that complainant was hired into an LTE position on November 6, 2001 and she reached her maximum hours for that position on July 30, 2001. It is also undisputed that during her employment with respondent, specifically on May 15, 2001, she received a note from a co-worker containing sexually explicit language. The co-worker was later suspended for work rule violations including sexual harassment/misconduct. Following his suspension, the co-worker submitted a letter voluntarily retiring. What is in dispute is whether respondent handled the investigation of the complaint timely and appropriately, and whether respondent retaliated against complainant following the filing of her complaint with respondent, including placing her in a position where she alleges she had no opportunity to continue her employment and finally releasing complainant from her employment with respondent.

An issue is moot when a determination is sought which can have no practical effect on a controversy *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W 2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W 2d 688, 689 (Ct. App., 1985). The focus, generally, us upon the available relief in relation to the individual complainant. see, e.g. *Lankford v. City of Hobart*, 36 FEP Cases 1149, 1152 (10th Cir., 1996) and *Martine v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994).

The test for mootness is whether the relief sought would, if granted, make a difference to the legal interest of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation). *Airline Pilots Association, International UAL Corporation*, 897 F.2d 1394 (7th Cir. 1990); *North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed. 2d 413, 92 S. Ct. 402 (1971). This Commission has ruled that the desire for personal vindication is the type of impact on the "psyche" which does not make a sufficient "difference to the legal interests of the parties" required for the a controversy to survive a mootness challenge. *Chiodo v. U.W. Stout*, 93-0124-PC-ER, 5/25/01, p.7; citing *Airline Pilots*.

The mootness question in relation to the present case before the Commission is whether complainant's release from employment with respondent and Mr. Bethke's retirement, events occurring after the initial complaint was filed, preclude the Commission from granting effective relief to complainant. *See*, 2 Am Jur 2d, *Administrative Law,* §519.

In *LaRose v. UW-Milwaukee,* Case No. 94-0125-PC-ER, 4/2/97, and *Burns v. UW,* Case No. 96-0038-PC-ER, 4/8/98, the complainants retired after filing their respective complaints with the Commission. In *Burns*, the Commission determined if the complainant were to prevail, her remedies (other that attorneys' fees and costs) would apparently be limited to an order to respondent to provide the requested accommodation and to cease and desist from discriminating or retaliating against complainant in regard to any future accommodation requests. These remedies were considered effective only if complainant were still employed by respondent. The Commission reached a similar conclusion in *LaRose*.

In the present case, complainant did not retire, and in fact, believes she had a reasonable expectation that her employment would continue with respondent. Complainant seems to base this belief on her prior work history which included three previous LTE positions with respondent, commencing September 27, 1999, March 27, 2000, and November 6, 2000, respondent's knowledge of complainant's desire to continue working with respondent and complainant's assertion that respondent had rehired other LTEs since the expiration of complainant's position on July 30, 2001.

In *Watkins v. IHLR Department*, 69 Wis. 2d 782, 233 N W 2d 360, 12 FEP Cases 816 (1975), the Wisconsin Supreme Court addressed the issue of mootness under the Wisconsin Fair Employment Act (FEA). There, the complaining party had been subsequently transferred to the position she had alleged in her charge had been denied her due to discrimination, and would not qualify for an award of back pay or other monetary relief were she to have prevailed in the action. The Court ruled that her FEA action was not moot because, as a continuing employee, a finding of discrimination could have the practical effect of requiring her employing agency to consider her for all future vacancies on the basis of her qualifications and ability, and without regard to her race. The Commission has interpreted *Watkins* to require that there be a reasonable expectation that the complainant could be subject to future actionable discrimination or retaliation by respondent in order for the controversy to withstand a challenge based on mootness. *Burns v. WHCA*, 96-0038-PC-ER, 4/8/98.

In *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98, the complainant voluntarily resigned from her position with UW-Madison after she filed a complaint alleging discrimination and accepted a position with the Department of Health and Family Services. Complainant argued that the Commission should not dismiss the complaint based on mootness because she continued to be employed by the State of Wisconsin, and, as a state employee, she had certain transfer and reinstatement rights. She could, as a result of these rights, apply for employment with respondent some time in the future. The Commission disagreed, stating, in part, that "some time in the future" was too speculative to defeat the motion.

The Commission finds that by looking at the facts of the present case, complainant's employment status, though in dispute, is not as speculative as in *Wongkit*.

In contrast to the complainant in *Wongkit*, complainant did not voluntarily leave her position with respondent because of new employment. Complainant is alleging that she should currently be employed with respondent and is challenging that issue before the Commission, in a second complaint (01-0168-PC-ER) filed subsequent to the present complaint which is the focus of this ruling. There is a clear link between the two cases. Both complaints involve the same parties, with similar facts which took place during the same time period. Both complaints are presently before the Commission. If complainant is successful in her second complaint, which alleges retaliation by the respondent resulting in complainant's termination, her employment status could be more defined by the conclusion of that case.

If complainant's allegation for the present complaint were based solely on Mr. Bethke's continued contact and communication, then a cease and desist order with respect to Mr. Bethke would not have any practical legal effect on the controversy, and the complaint would have to be dismissed on the ground of mootness. In complainant's letter dated December 11, 2001, complainant argues that the motion should not be dismissed as moot because Mr. Bethke's resignation was voluntary. The fact that Mr. Bethke voluntarily retired, does not change the fact that the relief available to the complainant would be ineffective.

Complainant has gone further and alleged that it was also the events that took place following her complaint of sexual harassment, including conduct by her supervisors during the investigation of the complaint and her work reassignment that create issues which should survive the motion to dismiss. If complainant were to

prevail in case 01-0168-PC-ER and were hired into an available LTE position for which she was qualified, then the possibility would exist that complainant could be subject to future actionable discrimination or retaliation. *See Watkins v. IHLR Department,* 69 Wis. 2d 782, 233 N W 2d 360, 12 FEP Cases 816 (1975). In such a circumstance, an order directing respondent to cease and desist from engaging in activities against complainant which would create a hostile and harassing atmosphere would be an effective remedy.

With respect to respondent's objection to complainant's reference to settlement offers made by respondent, the Commission did not use the settlement negotiation information in its decision.

ORDER

Accordingly, respondent's motion to dismiss the present complaint on the ground of mootness is denied.

Dated: April 19, 2002. STATE PERSONNEL COMMISSION

KST:010100Crul1

ANTHONY J. THEODORE, Commissioner

KELLI S. THOMPSON, Commissioner