

**KAY JAVENKOSKI
AND ROBERT KUBINEK,**
Complainants,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**FINAL DECISION
AND ORDER**

Case Nos. 95-0092, 95-0093, 96-0005,
96-0006, 96-0052,
97-0201-PC-ER

NATURE OF THE CASES

These cases involve complaints of discrimination on the basis of sex, sex harassment, and retaliation for participation in activities protected under the Wisconsin Fair Employment Act (WFEA) Subchapter II, Chapter 111, Stats. The six cases were consolidated for hearing and a hearing was held on the following issues:

JAVENKOSKI

Case No. 95-0092-PC-ER

1. Whether respondent retaliated against complainant for engaging in protected fair employment activities when supervisor Steffek gave complainant a poor performance evaluation in January of 1995.
2. Whether respondent discriminated against complainant on the basis of sex by subjecting her to an allegedly hostile work environment.

Case No. 96-0005-PC-ER

Whether respondent discriminated against complainant on the basis of sex, including sex harassment, or retaliated against her for engaging in protected fair employment activities in its enforcement of its dress code in December of 1995.

Case No. 97-0201-PC-ER

Whether respondent treated complainant differently than other co-workers when she requested new-issued uniform shirts and, if so, whether respondent discriminated against complainant on the basis of sex, including sex harassment, or retaliated against her for engaging in protected fair employment activities.

KUBINEK

Case No. 95-0093-PC-ER

1. Whether respondent retaliated against complainant for engaging in protected activities when supervisor Steffek gave complainant a poor performance evaluation in January of 1995.
2. Whether respondent discriminated against complainant on the basis of sex by subjecting him to an allegedly hostile work environment.

Case No. 96-0006-PC-ER

Whether respondent discriminated against complainant on the basis of sex, including sexual harassment, when lead worker Krebsbach allegedly touched complainant on December 6, 1995.

Case No. 96-0052-PC-ER

Whether respondent retaliated against complainant for engaging in protected fair employment activities when supervisor Hium allegedly posted an article in the Rhinelander office and provided a copy to complainant in April of 1996.

After reviewing the Proposed Decision and Order and the objections thereto, and after consulting with the hearing examiner, the Commission adopts the Proposed Decision and Order with certain modifications made to clarify the bases for the Commission's decision and for editorial reasons. In making these modifications, the Commission did not overturn or revise any of the credibility determinations made by the hearing examiner. In the Findings of Fact, any significant modifications are accompanied and

explained by alpha footnotes. The Opinion section in the Proposed Decision and Order was replaced by the Opinion section below.

FINDINGS OF FACT

1. Complainant Kay Javenkoski began working for respondent Department of Transportation (DOT) in the Division of Motor Vehicles (DMV) in 1984 as a seasonal worker in the Rhinelander office. She worked as a counter person responsible for conducting written and vision tests for drivers licensing, taking photographs, and issuing drivers licenses. Javenkoski also handled vehicle registration, titling requests, and, as necessary, reconciled daily activities and money intake.

2. Complainant Javenkoski worked as part of a team. In June 1985, co-worker Linda Krebsbach was promoted to team leader of the Rhinelander office. As team leader Krebsbach was responsible for the daily running of the office. Her duties included scheduling employe work assignments and breaks; reviewing time sheets, medical leave and vacation requests; training new employes; maintaining office supplies; and, when the supervisor of the unit was unavailable due to illness, vacation, or the use of leave for other purposes, performing certain of the supervisor's duties as a backup. Krebsbach did not have effective authority to hire, discharge, discipline, or evaluate other members of the team.[^] The first-line supervisor was based in Wausau and visited the Rhinelander team weekly

3. Complainant Robert Kubinek has worked for respondent in the DMV since January 21, 1985, as a driver license examiner. He transferred to the Rhinelander office in September 1986, after being informed of an opening there by Krebsbach, who knew he wanted to return to the Eagle River area where he resided.

4. When Kubinek transferred to Rhinelander, he became a friend of Krebsbach. Krebsbach made draperies for Kubinek's home in Eagle River, occasionally trimmed his hair, went with him to his mother and father's home for lunch

[^] This sentence was added and the last phrase of the previous sentence was modified to clarify the nature of Krebsbach's authority.

sometimes, and they went together to union meetings. (Complainant was a union representative.) Kubinek cut Christmas trees for Krebsbach's home, picked up Krebsbach for work, and sometimes stopped after work for drinks with Krebsbach and her husband. They exchanged birthday and Christmas gifts. When Kubinek was ill in the hospital with back problems, Krebsbach visited him frequently.

5. Complainant's immediate supervisor was Tom Young. The second-line supervisor was District Manager Lawrence Jandrin. Young was replaced by Richard Steffek in July 1989. Steffek's central office was at the District 4 headquarters in Wausau. He also supervised a third office at Antigo. These offices also had satellite offices. Steffek spent approximately two hours per week at the Rhinelander office and held three or four Rhinelander team meetings a year. At the meetings with the team, he would discuss policies, procedures, updates and changes; and any team or facility issues.

6. From the time Steffek arrived, there was conflict among certain team members; Steffek made an effort to resolve the conflict among the individuals to get them together and to work as a team.

7 From late 1989 until late 1991, at various times, for several weeks at a time, Steffek could not visit the teams at Wausau, Rhinelander and Antigo because of illness. However, Steffek had communication with his teams by electronic mail, teletype and telephone. Steffek returned to full-time duty in September 1991

8. On October 12, 1989, Richard Dolezalek reported to the Rhinelander station for field training as a Motor Vehicle Services Specialist (MVSS) 2. Respondent had hired Dolezalek to that position on October 8, 1989. On that date, Dolezalek reported to the State Patrol Academy at Fort McCoy for three days of orientation. Dolezalek's training schedule included eleven non-consecutive weeks in the classroom at the Academy.

9. Although Steffek was Dolezalek's designated supervisor at Rhinelander, team leader Linda Krebsbach was primarily responsible for his training. Krebsbach also functioned as a mentor for Dolezalek.

10. Dolezalek was provided field training at his temporary location in Rhinelander for several weeks. On May 21, 1990, Dolezalek was reassigned to a 50 percent part-time position on the Appleton team.

11. After short stints at Appleton and Milwaukee, Dolezalek returned on February 11, 1991, to Rhinelander to a seasonal MVSS 4 position. Dolezalek was a driver license aide, he could not give road tests. On August 26, 1991, Dolezalek was promoted to a full-time MVSS 6 position in Milwaukee as a driver examiner.

12. In a letter dated May 20, 1992, Kubinek made several complaints to District Manager Jandrin. Kubinek complained about Krebsbach's work schedules for the team and requested review of them by a supervisor before finalization. He complained of rumors concerning his reclassification or demotion and a discussion with Steffek; and he alleged an attempt was being made to create a slot for Dolezalek at the expense of his job.

13. By letter dated June 9, 1992, Jandrin addressed the issues raised by Kubinek. Jandrin was regretful of the rumors regarding Kubinek's reclassification or demotion. Kubinek also was informed that Steffek's discussion with Krebsbach concerned whether Kubinek wanted to be a driver examiner, and, if he did not, what were the options for the team. The records showed that most of the road testing was performed by examiner John Nuszkiewicz. Jandrin assured Kubinek that if he wished to retain his examiner classification (MVSS 6), the issue was closed. Jandrin also informed Kubinek that personnel rules and the union contracts determined the method for filling any position vacancy, and, if a vacancy occurred on the Rhinelander team, there was no guarantee it would be filled by Richard Dolezalek. Jandrin also advised Kubinek that team leaders were responsible for the work schedules and that he did not believe it was necessary for Steffek to review them before they were presented to the team.

14. The friendship between Krebsbach and Kubinek changed in late 1992-1993. Kubinek had married and, except for dinner with Krebsbach and her husband, they did not socialize together.

15. On March 8, 1993, Richard Dolezalek transferred from Milwaukee to a MVSS 6 position in Rhinelander, vacated by John Nuzkiewicz who had retired.

16. Prior to Dolezalek's return, Steffek was approached by Kubinek, Javenkoski, and Sue Katzner about Dolezalek's possible return to the Rhinelander station. Steffek had lengthy conversations with Kubinek, Javenkoski, and Katzner regarding their allegations that Dolezalek and Krebsbach had engaged in "sleazy behavior" during his former term there, and regarding Krebsbach's alleged favoritism of Dolezalek. The three team members did not provide Steffek any description of the alleged sleazy behavior. Kubinek, Javenkoski, and Katzner also made vague complaints to Steffek about Krebsbach making sexually suggestive remarks. Steffek advised them that he could take no action on a presumption such activity would recur on his return, but if it did, action would be taken.

17 Respondent could not preclude Dolezalek from returning to Rhinelander under a union contractual transfer without just cause to deny the transfer request.

18. Steffek asked for more details from the three Rhinelander team members, but received no information from them other than vague statements of offensive behavior of a sexual nature.

19. Steffek informed District Manager Jandrin of his discussions with the three Rhinelander team members. When Dolezalek transferred back to Rhinelander on October 8, 1993, Steffek was more observant of Krebsbach and Dolezalek.

20. In October 1993, subsequent to Dolezalek's return, Steffek received complaints from certain team members that Krebsbach and Dolezalek were engaging in offensive sexual behavior. Steffek suggested several options to them. The team members wished to remain anonymous. Steffek conferred with the Affirmative Action Office.

21. In spring 1994, Steffek talked with Krebsbach and Dolezalek about the allegations of offensive sexual behavior placed against them by unnamed team members. Krebsbach and Dolezalek denied that anything was going on between them of a sexual nature.

22. Steffek advised Krebsbach and Dolezalek that, if the allegations were in fact true, they should cease immediately; and, if they did not, further investigation and action would be taken.

23. In the summer of 1994, Kubinek contacted Connie Hultman with respondent's Affirmative Action Office (AAO). An appointment was made, and Hultman met with Kubinek at the Rhinelander station.

24. On September 15, 1994, Kubinek filed a discrimination complaint with the respondent's AAO against his supervisor, Richard Steffek, and District Manager Lawrence Jandrin. This complaint was in letter format. It did not indicate it was based on sex, sex harassment, or any WFEA retaliation. The complaint included, in part, the following:

Most of the problems center around delegation of duties to a non-supervisory team leader, and this team leader's manipulation of these delegated duties to satisfy her personal favoritism desires or negative treatment desires, whichever may be the case on an individual basis with other team members.

Any inter-personal relationship problems that do exist would most probably be associated with current management techniques and lack of resolution of problems by my supervisor or district manager.

In the complaint Kubinek charges that "[i]n the recent past" he was informed that his supervisor and team leader targeted him for a demotion; and, in 1992, his supervisor informed him that if he was absent from work for a prolonged time, recovering from necessary neurological surgery, his position would be filled in his absence, and he would have to "go shopping" for another position. Kubinek concludes with the following comment:

By filing this discrimination complaint, I hope to establish normal working conditions, normal communication networks, normal work

assignment delegation by management, and put an end to the macro management techniques affecting me on a daily work basis.^B

25. In October 1994, Kubinek filed an AAO complaint form with respondent's AAO, alleging Krebsbach favored a man in the office and had offended former male employees by her behavior. Kubinek also provided Hultman with a list of employees to contact. The list did not include Richard Dolezalek's name. This complaint contained allegations of discrimination on the basis of disability (a ground not now at issue in these cases) and sexual harassment.^C

26. Hultman informed Motor Vehicle Field Services Bureau Director David Kussow that a complaint had been filed and was being reviewed by the AAO.

27. Supervisor Steffek first learned of Kubinek's complaint to AAO in December 1994 at a manager's meeting convened by Kussow. Hultman informed the group that she was currently investigating a complaint with respect to activities at a Rhinelander station submitted by Robert Kubinek. Hultman mentioned Kay Javenkoski in connection with the complaint. No other names were provided to the group by Hultman other than Krebsbach and Dolezalek.

28. Hultman informed the group she had interviewed past and present members of the Rhinelander team. Hultman had documentation of the conducted interviews and showed the group a copy of anonymous allegations regarding the behavior of Krebsbach. No copies of this document were provided to the group.

29. In January 1995, DMV management, prompted by the Hultman investigation, implemented an Action Plan for the Rhinelander team. The Action Plan objective was to resolve the continuous inter-team conflicts and to eliminate any inappropriate behavior as alleged in the Hultman report.

^B The Commission has added information reflected in the complaint (Appellant's (Complainant's) Exhibit 2) to more fully describe the complaint.

^C The Commission has added information reflected in the complaint to more fully describe the complaint.

30. In accordance with the Action Plan, Steffek and Jandrin began interviewing each member of the Rhinelander team. Each team member was informed of the AAO investigation. Each team member was advised that, if she/he was engaging in inappropriate sexual behavior in the work place, such activity should cease. Each team member was informed of the DOT sexual harassment policy; and given a copy of it and of the Action Plan. Each member was also advised of pending sexual harassment training.

31. Approximately two weeks after the Steffek-Jandrin meetings with Rhinelander team members, team member Sue Katzner reported to Jandrin that she had just recently observed Krebsbach kissing the owner of a drivers education school at the Rhinelander station. The alleged incident occurred before business hours in the entrance hall outside the office doors. When questioned about the incident by Jandrin, Krebsbach denied kissing the drivers education school owner, but admitted to a "peck on the cheek." Jandrin then counseled Krebsbach.

32. In January 1995, Kubinek received a poor work performance evaluation from his supervisor, Richard Steffek for the year 1994. Steffek concluded Kubinek's work performance failed to meet normal performance standards. Contrary to Kubinek's claims, team leader Krebsbach had no input into the evaluation. Kubinek refused to sign the evaluation.

33. Steffek based Kubinek's poor evaluation on the following determinations:

- (1) Kubinek refused to give a customer a road test because she reported late. On November 11, 1994, Steffek issued a letter of reprimand to Kubinek for violating DOT Work Rule 2, neglecting job duties or responsibilities. Kubinek was treated no differently than other employees under similar circumstances.
- (2) Kubinek needed to work within the framework of the team to promote harmony and unity.
- (3) Kubinek consistently had conflicts with customers and needed to improve his customer skills.

(4) Kubinek consistently rebelled against the responsibilities and authority of the team leader

33A. Steffek had a reasonable basis for his evaluation.^D

34. Complainant Kubinek complained to his second-line supervisor District Manager Jandrin. By memorandum dated February 15, 1995, Jandrin directed its Bureau of Personnel to replace the Steffek evaluation with one he provided, which indicated Kubinek's work performance met normal performance standards.

35. During this same time period, Javenkoski received a poor work performance evaluation for the year 1994 from supervisor Steffek. Under the performance summary section, "No" was checked, indicating Javenkoski had not met normal performance standards. Javenkoski signed the evaluation.

36. Steffek gave Javenkoski a poor work performance evaluation for several reasons. Previously Javenkoski had received a "letter of understanding" (not a reprimand) for failing to follow through on scheduling road testing for a traveling team. This incident caused added office friction. Later, Javenkoski received a letter of reprimand on October 10, 1994, for failing to follow supervisory instructions (DOT Work Rule 1). Javenkoski had failed or refused to properly process a driver license and registration transaction for the second time in a month. After the initial error, Javenkoski was counseled and provided written instructions, and she indicated she knew how to perform the task and promised to do the transactions correctly. Regarding the team harmony effort promoted by management, Javenkoski made no effort to improve or work toward team harmony.

36A. Steffek had a reasonable basis for his evaluation of Javenkoski.^E

37. Supervisor Richard Steffek retired February 3, 1995. Steffek never observed Linda Krebsbach and Richard Dolezalek engage in any behavior of a sexual nature. Kubinek never told Steffek that Krebsbach kissed, hugged or directed sexually suggestive remarks at him in the work place.

^D This finding makes explicit what is implied in the proposed decision.

^E This finding makes explicit what is implied in the proposed decision.

38. Complainant Javenkoski never reported to Steffek that Krebsbach made a sexually suggestive remark to her regarding a toy cat.

39. Steffek never witnessed Krebsbach kiss anyone in the work place, nor was he ever kissed by her.

40. Steffek did witness Krebsbach once hug the DMV administrator. Krebsbach once hugged Steffek, after returning distressed from a road test. The hugs were not sexual in nature.

41. By letter dated February 14, 1995, Javenkoski complained to the district manager Javenkoski's poor evaluation was replaced by another one, indicating her work performance for 1994 met normal employe standards.

42. In March 1995, team member Katzner brought a Redbook magazine to the office. As Katzner paged through the magazine during lunch break, she happened upon an article entitled "A Day in the Life of a Penis." Katzner showed the article to other team members, including Krebsbach.

43. While traveling in a state van to the Minocqua satellite office on March 23, 1995, with Kubinek and Dolezalek, Krebsbach had a Redbook magazine with the article and showed it to them. Kubinek reported the incident in a note dated April 9, 1995, to Hultman in the AAO. It became a part of Hultman's on-going investigation with the team members.

44. Harassment training was held for the Rhinelander team on May 19, 1995, in Rhinelander. The entire Rhinelander team participated. This was provided by respondent in conjunction with its Action Plan.

45. Supervisor Steffek was replaced by two interim appointees until May 23, 1995, when the position was filled by Jo Ann Hium.

46. Kubinek never mentioned to Jandrin, during his interview and other contacts with him, that Krebsbach had hugged or kissed him at the work place.

47. At some point, Krebsbach approached Javenkoski with a toy cat riding a bicycle and asked Javenkoski "Did you lose your pussy"? This incident was related to a prior incident where a customer with a toy cat made a similar comment in the office,

and later this comment was bantered around the office.^F During her interview or other contacts with Jandrin, Javenkoski never said anything to him regarding unsavory remarks to her by Krebsbach in reference to a toy cat.

48. In connection with respondent's Action Plan, Hium spent more time at the Rhinelander office than her predecessor for purposes of observation and being available for discussion with the team members.

49. Complainant Kay Javenkoski filed a discrimination complaint (Case No. 95-0092-PC-ER) against respondent with the Personnel Commission on August 1, 1995.

50. On that same date, complainant Robert Kubinek filed a discrimination complaint (Case No. 95-0093-PC-ER) against respondent.

51. On September 13, 1995, the DOT AAO, issued a report on the October 17, 1994, complaint to them by Kubinek. The report provided background as follows:

In November 1994, as part of an administrative review process, the Affirmative Action Office conducted interviews with Rhinelander team members, and some former team members, to see if Kubinek's allegations of an offensive work environment, favoritism and inappropriate behavior by the Rhinelander team leader could be verified. As a result of that administrative review some concerns were identified and DMV management developed a *Corrective Action Plan* in January 1995. Management believed that these conflict resolution efforts were successful until Robert Kubinek called the Affirmative Action Office on April 17, 1995, and requested that his original complaint be reintroduced. He reported that there were recurring and continuing problems. He stated that he felt there had been no follow-up or monitoring of the Rhinelander problems nor had there been any changes to the environment within that office. The Affirmative Action Office reopened the complaint and proceeded with investigatory interviews. On April 19, District Manager Lawrence Jandrin was advised of the complaint filed against him by Kubinek on April 17, and informed that an investigation would be ensuing. On May 1, the Affirmative Action Office informed Linda Krebsbach of the complaint filed against her by Mr. Kubinek.

^F This finding is added to reflect additional matter that is mentioned in the opinion but was not explicitly found in the findings of fact.

52. Under the Findings section of the report, the AAO found "cause to believe" that Linda Krebsbach did discriminate against Robert Kubinek.

The research substantiates that Ms. Krebsbach as lead worker extended favorable treatment to a male co-worker, which caused disruption among the team. It also supports Mr. Kubinek's assertions that Krebsbach exhibited inappropriate behavior of a sexual nature toward that male co-worker; that in fact this behavior became so disruptive that DMV management developed and implemented a corrective action plan in January 1995. There is also evidence that even after that plan had been administered, Linda Krebsbach brought into the work place a copy of a Redbook magazine article of sexual content and showed it to male co-workers. This behavior provided an intimidating environment for Mr. Kubinek because Mr. [sic] Krebsbach is a lead worker, and because her behavior was offensive to Mr. Kubinek he experienced a hostile working environment.

53. The AAO in its report found "no probable cause" to believe "management" retaliated against Kubinek in respect to his 1994 work performance evaluation.

54. The following conclusions were reached by the AAO in its report:

VI. Conclusions

1. Linda Krebsbach should receive discipline which is commensurate with a first time finding of discrimination based on sexual harassment of this type. She should also be counseled concerning her responsibilities to the team. This discipline and counseling should be corrective in nature.
2. A conflict resolution process should be conducted to address the dissention caused by Linda Krebsbach's behavior in the work place. Further, one-on-one conflict resolution sessions should be conducted between Linda Krebsbach and Robert Kubinek. Because of a history of conflict between the two, the focus should be on achievement and maintenance of courteous and professional interactions on the job, in support of team effectiveness and accomplishment of work unit goals.

3. Linda Krebsbach should be encouraged to apologize to the team for the disruption caused by her behavior, to acknowledge the impact her behavior has had on the team, and to move forward with the team to focus on the overall mission of the operation.

55. Respondent held a pre-disciplinary hearing with Krebsbach on October 23, 1995. By letter dated November 13, 1995, Krebsbach was suspended from duty without pay for one day, effective December 5, 1995, for displaying the Redbook article to Kubinek and Dolezalek (Dolezalek never made a complaint). This discipline was grieved and an arbitrator eventually overturned it, concluding that the incident did not amount to sexual harassment.

56. In early December 1995, the recently appointed supervisor Hium met individually with each Rhinelander team member. During Hium's meeting with Kubinek on December 15, 1995, Kubinek reported that, while at the Eagle River satellite office on December 6, 1995, Krebsbach touched his leg, put her hand in his pocket and placed a ring inside, before leaving to conduct a road test. Kubinek also reported that on that day, Krebsbach called a team member a "bitch" after conducting a telephone conversation with that person. Kubinek also stated that favoritism was still occurring; team members Gail Eaker, Harry Hicks and Dolezalek were allowed to arrive late for work.

57. Krebsbach acknowledged to Hium that she did put her ring in Kubinek's pocket, but that she did not touch his thigh or leg, or put her hand in his pocket.

58. After the completion of Hium's investigation, which involved interviewing the employees and customer present during the incident, Krebsbach was given a three-day suspension without pay for violating the bureau's work rule prohibiting any type of harassment.

59. Krebsbach filed a grievance about this three-day suspension and the arbitrator concluded that Krebsbach's action showed poor judgment but not sexual harassment, and reduced the three-day suspension to a written reprimand.

60. Javenkoski had her meeting with Hium on December 19, 1995. Javenkoski had been wearing her own sweater and slacks to work as a uniform, so Hium reviewed the bureau dress code with her. Hium told Javenkoski that she could provide her own dark blue pullover sweater, but the code required that it have a V-neck. Javenkoski agreed to comply. With regard to the slacks, Javenkoski explained that some ten years prior, when Tom Young was supervisor, she had obtained a medical excuse not to wear bureau-issued slacks. The slacks worn by Javenkoski had a navy blue stripe and were not a solid grey color as required by the dress code.

61. Hium confirmed that Young had requested a medical excuse from Javenkoski, but she could find no written verification. Under instructions from her supervisor, District Manager Jandrin, Hium asked Javenkoski to provide a current medical verification to wear non-uniform slacks. Javenkoski never presented Hium with a new medical excuse, and Hium never again asked Javenkoski to provide one.

62. During the same December 1995, meeting with Hium, Javenkoski stated she had been informed that Krebsbach had sworn at her after hanging up the phone from a call with her.

63. On January 8, 1996, Javenkoski filed a charge of discrimination with the Commission (Case No. 96-0005-PC-ER). Among the claims was an allegation of retaliation in regard to the DOT dress code. On that same date, Kubinek filed his second claim of sex discrimination and harassment (Case No. 96-0006-PC-ER) in connection with the Krebsbach ring incident.

64. On March 4, 1996, private consultant Lisa Wobn-Behrman issued a Rhinelander Team Needs Assessment report to the team members and to supervisors Hium and Jandrin. Behrman was contacted by management, after the AAO investigation was concluded, to identify the concerns and conflicts that existed in the Rhinelander team.

65. The Behrman Needs Assessment report provided under Summary of Concerns, in part, as follows:

1. **An atmosphere of disrespect and hostility is experienced by everyone.** Relationships among many members of the Rhinelander Team are perceived as problematic. Many described an increase in "back-stabbing", gossip, making assumptions about others, and numerous unresolved conflicts. Inability to trust relationships due to fear of harsh criticism, harassment or retaliation was voiced by all to some degree. Conversely, many examples of positive interactions among co-workers were provided, however, each member of the team carries significant concerns that greatly interferes with creating and maintaining a respectful environment.
2. **Two distinct factions have formed within the Rhinelander Team that contributes to a distrustful and negative atmosphere.** Everyone interviewed identified the formation of two groups or alliances within the Rhinelander Team, yet not everyone perceives him/herself as aligned with one particular group. Support for Linda Krebsbach vs. support for Bob Kubinek appears to be the key divider. Many issues and perspectives flow from this. These two factions serve to support one's belief while at the same time promote or maintain the misunderstandings that helped to create these factions, as opposed to understanding another's perspective and potentially working toward resolution of difficult issues.
3. **The "Rhinelander Team" has experienced highly conflictual issues for several years without satisfactory resolution that has resulted in the perpetuation of conflict and ineffective responses to conflict, and ultimately a "culture" of conflict.** Most everyone interviewed described the current conflicts as ongoing and relentless. Numerous complaints and grievances have been filed either informally, via discussion with management, or through the formal grievance process. Many perceive the current differences that exist among staff as so well entrenched and ingrained that realistic and sustained resolutions to the conflicts cannot be reached within the current "culture".

In assessing the Rhinelander office, Behrman interviewed each team member and management. The record substantiates the above summary by Behrman.

66. District Director Jandrin retired on April 26, 1996. Jandrin was replaced as district manager by Linda Lewis. Shortly after Lewis arrived, on May 24,

1996, Rhinelander team supervisor Hium accepted a position in another state department. Hium was replaced as supervisor by David Coady

67. Initially, Lewis visited Rhinelander "fairly frequently." Lewis had a meeting with the Rhinelander team members and expressed her views as supervisor and her expectations of the team. Lewis knew about the inter-office conflicts and the many grievances and complaints filed by Kubinek, Javenkoski, and Krebsbach.

68. Later, Lewis noticed in a newspaper an article "Our own will governs which way attitudes will tilt" and sent copies of it to her three supervisory area offices. This article described two people: Bob, a bitter cynical person, and Shannon, who was just the opposite. Lewis did not direct the area offices to post the article.

69. Kubinek believed the article, which was distributed to the Rhinelander station and posted on its board, was directed at him. Kubinek was one of four other employes under Lewis' supervision named Bob.

70. Kubinek never complained about the posted newspaper article to his immediate supervisor or Lewis. On May 10, 1996, Kubinek filed his third claim of discrimination against respondent (Case No. 96-0052-PC-ER) in regard to the newspaper article.

71. After respondent was advised of Kubinek's May 1996 complaint by the Personnel Commission, and formal responses to the complaint were completed, Lewis went to the Rhinelander station and talked privately with Kubinek. Lewis removed the article from the bulletin board and told Kubinek it had not been directed at him. Lewis had not placed the article on the bulletin board. It is unknown who placed the article on the board.

72. On November 10, 1997, Javenkoski requested three uniform shirts and a zippered sweater. Supervisor Coady informed Javenkoski that special requests such as hers fell outside the district's cycle for ordering clothing and were reviewed on a case-by-case basis for immediate order. "Thus our request to see a shirt," he advised.

73. Javenkoski showed Coady the shirt she was wearing, which had a worn buttonhole. Coady signed the clothing order form and gave Javenkoski a copy. Coady

never advised Javenkoski to send her worn shirts to Lewis for approval of her clothing request. Believing that her clothing request required Lewis' approval, Javenkoski sent Lewis one of her shirts for inspection. Lewis was surprised to receive the shirt, but she wrote Javenkoski a note thanking her and advising her that Coady would be reviewing worn out clothing for pre-approval of special clothing orders in the future.

74. At approximately the same time, employe Michael Genrich made a request for new shirts and, like Javenkoski, Coady requested Genrich to show him a worn out shirt. Coady pre-approved Genrich's request, but Genrich never received his new clothing because he failed to show Coady a worn shirt.

75. During the period at issue, profanity was commonplace among the Rhinelander team members. The "F" word was used by some team members, including Kubinek. All types of jokes were told. Kubinek made up jokes about customers, co-workers, and management. On several occasions Kubinek was belligerent toward Krebsbach. He swore at her; and referred to her as a slut, bitch, or whore. On a number of occasions, he referred to another female employe as a bitch. Javenkoski, on many occasions, also referred to Krebsbach as a slut or bitch, and called Dolezalek a "male slut." Javenkoski made comments about a young man's "tush" and called the male employe "studmuffin" or "my little studmuffin." Kubinek and Javenkoski rumored various sexual improprieties by Krebsbach, including having sexual relations with Dolezalek.

76. Krebsbach kissed Kubinek several times between 1986 and about 1990, when their relationship began to cool. Krebsbach never kissed Kubinek during the "actionable period"—i. e., on or after October 5, 1994. *See* §111.39(1), Stats. Krebsbach hugged complainant several times between 1986 and 1994. These hugs were non-sexual in nature.^G

77. Krebsbach and Dolezalak did not engage in any workplace physical contact of a sexual nature during the relevant time period.^H

^G This finding makes explicit what is implied in the proposed decision.

^H This finding makes explicit what is implied in the proposed decision.

78. On December 18, 1997, Javenkoski filed a sex/harassment/retaliation discrimination complaint against respondent (Case No. 97-0201-PC-ER) with respect to her request for replacement of uniform shirts.

79. Currently Krebsbach and Dolezalek are not members of the Rhinelander team. Krebsbach voluntarily transferred to the Wausau team on May 12, 1997, and Dolezalek transferred to the Milwaukee Southwest team on September 29, 1997.

CONCLUSIONS OF LAW

Case Nos. 95-0092-PC-ER, 96-0005-PC-ER, and 97-0201-PC-ER

1. These matters are properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant in each case has the burden to prove that she was discriminated/retaliated against as alleged.
3. Complainant has failed to sustain this burden in each case.

Case Nos. 95-0093-PC-ER, 96-0006-PC-ER, and 96-0052-PC-ER

1. These matters are properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant in each case has the burden to prove that he was discriminated/retaliated against as alleged.
3. Complainant has failed to sustain this burden in each case.
4. This case is untimely filed as to the allegations related to alleged kissing of Kubinek by Krebsbach which occurred prior to October 5, 1994 (Case No. 95-0093-PC-ER.¹

¹ This conclusion is added to reflect a conclusion of law found in the proposed decision in the opinion section.

OPINION

In claims of discrimination and retaliation under the Wisconsin Fair Employment Act (WFEA), the Commission uses the method of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 765 (1973), *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 25 FEP Cases 113 (1981). This method of analysis provides that complainant has the initial burden to show a prima facie case. If complainant meets this burden, then respondent has the burden to rebut the prima facie case by presenting a legitimate, non-discriminatory reason for its action; and, in turn, the burden shifts back to complainant to show respondent's reason was a pretext for the prohibited discrimination.

In the context of discrimination regarding terms and conditions of employment, a prima facie case is demonstrated if the evidence shows that 1) the complainant is a member of a protected group; 2) the complainant suffered an adverse term or condition of employment; and 3) the adverse term or condition exists under circumstances which give rise to an inference of discrimination.

To establish a prima facie case of retaliation, complainant must show (1) that she engaged in a statutorily protected activity; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected activity and the adverse action. *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F. 2d 1307, 1313, 50 FEP Cases 1215 (7th Cir. 1989).

Claims of sexual harassment are governed by §111.36(1), Stats., of the WFEA which states as follows, in relevant part:

Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer . . . or other person:

(b), Stats. 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 or permitting sexual harassment to have the purpose or effect of

substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment. Under this paragraph, substantial interference with an employee'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 employee 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, other than the conduct described in par (b), 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 employee'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 employee 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.

Sexual harassment is defined for purposes of the WFEA in §111.32(13), Stats., as follows:

§111.32(13), Stats. "Sexual harassment" means unwelcome sexual advances . . . 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 employee's work performance or to create an intimidating, hostile or offensive work environment.

JAVENKOSKI

Case No. 95-0092-PC-ER

1. Whether respondent retaliated against complainant for engaging in protected fair employment activities when supervisor Steffek gave complainant a poor performance evaluation in January of 1995.

Complainant claims supervisor Steffek gave her a poor work performance evaluation in January 1995 in retaliation for her participation in the investigation of co-worker Kubinek's complaint.

In order to show a prima facie case of discrimination or retaliation under the WFEA, 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." The applicable standard, if the subject action is not one of those specified in this statutory section, 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).. . .

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.

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.

The Commission relied on this rationale in concluding in *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99, that a negative performance evaluation in and of itself does not constitute an adverse employment action. *See, also, Dewane v. UW*, 99-0018-PC-ER, 12/3/99. The same conclusion is reached here, and complainant has not established a necessary element of both a prima facie case and a successful claim under the WFEA.¹

If complainant had shown a prima facie case of retaliation, the burden would then shift to respondent to articulate a legitimate, nondiscriminatory reason for its action which respondent has done by explaining that the poor evaluation was based on complainant’s failure or refusal to perform required services for DMV’s customers,

¹ This language concerning adverse action is added because this is a necessary element of a claim of this nature, and it was not addressed in the proposed decision. The Commission further notes that even if it were assumed that there was an adverse action, complainants have not established a claim of WFEA retaliation, for the reasons which follow.

which resulted in discipline, and her failure to work toward improving team harmony. (See Finding of Fact 36.)

The burden would then shift to complainant to demonstrate pretext. Complainant makes the following pretext arguments: (1) Linda Krebsbach received an overall positive work performance evaluation during this same period despite allegations of sexual harassment made against her by team members, i.e., complainant and Kubinek; and (2) supervisor Steffek's testimony to the contrary, Krebsbach had some input on her evaluation. In support, complainant states that Krebsbach said to her, "I will be working on your evaluation tomorrow; a box of chocolates would be nice;" and that Steffek was only at the Rhinelander station an average of two hours per week and was required to rely on Krebsbach's regular updates on the team's performance.

We find complainant's arguments unavailing. Complainant does not contend that her performance was not as represented by respondent or that this level of performance was not deficient. Physical evidence and complainant's own statements to Steffek, not reports from Krebsbach, substantiated Steffek's reasons for giving complainant a poor evaluation. Steffek testified that Krebsbach provided no input in his evaluation of complainant, and we believe Steffek is a credible witness. It should finally be noted that Steffek's supervisor, Jandrin, replaced this evaluation with another one in less than a month, reversing Steffek and indicating that complainant met normal performance standards. Nothing else in the evaluation, including Steffek's description of the actions upon which he based his unsatisfactory rating, were changed. Jandrin's conclusion that complainant's performance met standards resulted from a different interpretation of the language on the evaluation form by respondent's human resources office. Although such a reversal could be probative of pretext, the nature of complainant's performance shortcomings would reasonably support a conclusion of unsatisfactory work performance under the circumstances present here. Regardless of what Krebsbach's evaluation was during this period, and what inferences could be drawn from this, the record supports a conclusion that Steffek had a reasonable,

nondiscriminatory rationale for complainant's evaluation, and this outweighs any such inferences^K and it is concluded, as a result, that pretext has not been demonstrated.

2. Whether respondent discriminated against complainant on the basis of sex by subjecting her to an allegedly hostile work environment.

Complainant's allegations in regard to this issue are as follows:

- (1) Linda Krebsbach made frequent comments about employe Keith Moreland's butt. In 1989-90 Krebsbach commented, "they should always let Keith load the equipment because then she could get a view of his butt."
- (2) Employes Russell Rudolph, Keith Moreland, and Robert Kubinek were on more than two occasions given unwelcome hugs by Krebsbach.
- (3) Employe Rudolph informed Javenkoski just prior to leaving the Rhinelander team in November 1990, that Krebsbach gave him an unwelcome kiss.
- (4) Krebsbach was more friendly to male employes and offered to do extra tasks for them, but not for female employes.
- (5) In August 1993, Javenkoski observed Krebsbach and Dolezalek in the work place unbuttoning their shirts exposing their cleavage and chest to show sunburns.
- (6) In October 1994, Javenkoski observed Krebsbach put her hand on Dolezalek's forehead when he said he was not feeling well.
- (7) In November 1994, Javenkoski observed Krebsbach use something to brush dirt from Dolezalek's coat, including "the groin area."
- (8) Krebsbach is "continually" in Dolezalek's cubicle with him "shoulder to shoulder, hip to hip."
- (9) During a trip at Eagle River, Krebsbach approached Javenkoski with a toy cat on a bicycle in her hand and said, "Did you lose your pussy?"
- (10) Javenkoski observed Krebsbach once greeting the district manager with a hug. Javenkoski also observed Krebsbach greeting the bureau

^K This sentence is added to make the rationale for the decision on this point more explicit.

director with a hug on several occasions over a period of years when he made his annual visit to the office.

Complainant Javenkoski acknowledges she was not the direct target of sexual harassment by team leader Krebsbach, but contends she “worked in an environment in which men were the targets of harassment by [Krebsbach]” and “[w]orking in this discriminatory atmosphere made [her] angry and distracted her ability to do her job.” Further complainant contends, “[I]n order for the WFEA to fulfill its purpose in striking at the entire spectrum of discrimination against men and women in the work place, it must also recognize claims of persons who are not direct targets of the discrimination, but are nonetheless significantly and detrimentally affected by it.”

Both the statutory language and case precedent require that the objectionable conduct alleged to constitute sexual harassment under §111.36(1)(br), Stats., be directed at the complainant in order to be actionable. *See, e.g., Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99. It is concluded that allegations (2) and (3) fail to meet this requirement since the record shows that complainant’s knowledge of the conduct which forms the basis for these allegations was derived solely from reports to her from Rudolph, Moreland, and Kubinek. Even if the WFEA could be interpreted so expansively as to reach acts directed at third parties (as opposed to a complainant), we do not think it can cover conduct which the complainant heard about from second-hand sources. To the extent complainant advances these allegations as a claim covered by § 111.36(1)(b), Stats. (conduct of a sexual nature), they fall far short of the necessary level of severity.¹

In regard to allegation (1), there was testimony by a female witness—not Krebsbach—that complainant made similar comments about Moreland, referring to him as a “studmuffin” or “my little studmuffin;” and made comments about the “tush[es]” or “cute tush[es]” of teenage boys. Considering complainant’s own behavior, it would

¹ This discussion is added to make more explicit and to clarify the rationale for the decision on these issues.

have to be concluded that Krebsbach's statements which are the subject of this allegation did not create an offensive work environment for her

Allegation (4) (Krebsbach's friendliness and helpfulness to male employees only), does not support a conclusion that complainant was harassed due to her sex. There were four female Rhinelander team members, including team leader Krebsbach. One female team member testified that Krebsbach helped everyone on the team "at one time or another." This witness also testified to being befriended by Krebsbach, when she was in need, even though she was not friends with Krebsbach and did not at that time want to work with her. Testimony supports the conclusion that Krebsbach was not particularly friendly toward Javenkoski or toward the other female team member who had competed against Krebsbach for the team leader position. Considering these office dynamics, the record does not support a conclusion that the alleged conduct was directed at complainant because of her sex as required for a finding of sexual harassment under §111.36(1)(br), Stats. Moreover, the activity was not sexual in nature as required for a finding of sexual harassment under §111.36(1)(b), stats., in a case of this nature. Also, the record does not show that the alleged conduct was sufficiently severe to satisfy the definition of sexual harassment even when considered in the totality of circumstances here.

In regard to allegations (5), (6), (7) and (8), these actions, though arguably distasteful in a work setting, would not be sufficiently severe or opprobrious to satisfy the definition of sexual harassment under either §111.36(1)(b) or (br), even when considered in the totality of circumstances here. *See, Baskerville v. Cullen Intl. Co.*, 50 F. 3d 428, 67 FEP Cases 565.

In regard to allegation (9) (the toy cat incident), Krebsbach does not recall making the comment. However, although we have found this allegation to be factually correct, it stemmed from a prior incident where a customer with a toy cat made a similar comment in the office, and later this comment was bantered around the office. Given the fact that nearly all the employees in the office, including complainant, engaged routinely in this type of banter, it is concluded that complainant has failed to

sustain her burden of showing that this comment created, an intimidating, hostile, or offensive work environment for her as required for a finding of sexual harassment, even when considered in the totality of circumstances here.

In regard to allegation (10), complainant testified that she viewed the hugs given to Jandrin and Kussow by Krebsbach "more as a greeting" and did not "feel quite as bad" as the "other situation," which she, in fact, never observed. It cannot be concluded, based on this testimony of record, that complainant has sustained her burden of showing that this conduct contributed to the creation of an offensive working environment for her.

Case No. 96-0005-PC-ER

Whether respondent discriminated against complainant on the basis of sex, including sex harassment, or retaliated against her for engaging in protected fair employment activities in its enforcement of its dress code in December of 1995.

On December 19, 1995, complainant's new supervisor (Ms. Hium) questioned her about the fact that she was wearing slacks that did not meet the dress code. In response, complainant informed Hium that, ten years earlier, she had provided management a doctor's excuse which allowed her to wear non-state-issued slacks. When Hium was unable to locate this excuse, she asked complainant "if she would" provide an update. Complainant refused, saying that she did not feel that she should have to get another copy, that respondent should have a copy in the file, and that she was not going to take time off from work to do that. Complainant was subsequently allowed to continue wearing her gray slacks with a navy stripe which did not conform with the dress code's specification of plain gray slacks, and was not required to submit a doctor's excuse.

In regard to the sex discrimination claim, complainant has failed to show two necessary elements of a prima facie case. First, the only action which was actually taken here was Hium's inquiry about the non-conforming slacks and request for an update of complainant's medical excuse, which she didn't enforce. This action did not

have a sufficient effect on complainant's employment to constitute an adverse term or condition of employment. Moreover, complainant has not pointed to any disparate treatment sufficient to create an inference of discrimination, i.e., complainant has not shown or even asserted that similarly situated male employees were not subject to the requirements of the dress code or questioned when their dress did not comply. Moreover, the only person who was cited in the record as not being required to wear state-issued slacks was Sue Katzner who wore plain gray slacks which did not look any different than the state-issued slacks. In fact, the record does not show that Katzner's supervisors were aware or had any reason to be aware that she was wearing non-conforming slacks. Obviously, if complainant was held to a different standard than Ms. Katzner, which she has failed to show, it was not due to her sex.

The retaliation allegation fails because the action which forms the basis for this allegation does not constitute an adverse term or condition of employment, as discussed in regard to the sex discrimination allegation.

Finally, the nature of the conduct here does not come close to the level of severity necessary to satisfy the definition of sexual harassment, even when considered in the totality of circumstances here.

Case No. 97-0201-PC-ER

Whether respondent treated complainant differently than other co-workers when she requested new-issued uniform shirts and, if so, whether respondent discriminated against complainant on the basis of sex, including sex harassment, or retaliated against her for engaging in protected fair employment activities.

Complainant claims here that she was required to send her flawed shirt to her district manager in order to be able to order a new one. The record does not, however, support this version of events. Supervisor Coady, complainant's supervisor of five months, did not advise complainant to send her shirts to District Manager Lewis. After complainant showed Coady a sample shirt of the clothing she needed replaced—the one she was wearing—Coady signed the approval form and gave complainant a copy

Coady testified that perhaps complainant misunderstood him when he discussed with her the policy on ordering clothing outside the normal order cycle, because he commonly used the term “we”—indicating a “unified management front”—when referring to policy issues. Complainant was treated no differently than co-worker Michael Genrich. Complainant received her new clothing. However, Genrich, unlike complainant, did not receive new clothing because he failed to show Coady a worn shirt.

Even if complainant had been required to send her shirt to the district manager contrary to typical practice, such an action would not have the type of concrete, tangible a sufficient effect on her employment to sustain a finding that it constituted an adverse employment action for purposes of making out a prima facie case of discrimination or retaliation. Moreover, even if true, this action would not come close to the level of severity necessary to satisfy the definition of sexual harassment, even when considered in the totality of circumstances here.

KUBINEK

Case No. 95-0093-PC-ER

1. Whether respondent retaliated against complainant for engaging in protected activities when supervisor Steffek gave complainant a poor performance evaluation in January of 1995.

Complainant has failed to show a prima facie case of retaliation. One of the requisite elements of a prima facie case is a showing that the complainant has suffered an adverse employment action. As discussed above, a poor performance evaluation in and of itself does not constitute such an adverse action. *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996); *Dewane v. UW*, 99-0018-PC-ER, 12/3/99. If complainant had made out a prima facie case, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its action which it has done by explaining that complainant received a poor performance evaluation based on the factors set forth in Finding of Fact 33. Complainant has failed to show that his

performance did not suffer from these deficiencies. Also, contrary to complainant's assertion, Krebsbach had no input into his evaluation. Steffek retired on February 5, 1995, a few days after the date of this evaluation. On February 15, 1995, District Manager Jandrin, Steffek's supervisor, changed the evaluation to indicate complainant had met normal work performance standards in 1994. This change by Jandrin was based on a discussion with respondent's personnel bureau. No other change in the evaluation was made. Although such a reversal could be probative of pretext, the nature of complainant's performance shortcomings would reasonably support a conclusion of unsatisfactory work performance under the circumstances present here and it is concluded, as a result, that pretext has not been demonstrated.

2. Whether respondent discriminated against complainant on the basis of sex by subjecting him to an allegedly hostile work environment.

Complainant Kubinek's allegations of sex discrimination premised on a hostile work environment are, in substance, as follows:

- (1) Team leader Linda Krebsbach kissed him on the mouth approximately six times during the first four years of his employment at the Rhinelander station.

- (2) On a weekly basis, from the time he started in Rhinelander in September 1986 until "late" 1994, Krebsbach initiated hugs with him "under the pretense that she needed comfort after a difficult work situation."

- (3) Krebsbach used sexually explicit language in the work place. For example, once in January 1995, Krebsbach shared an e-mail message with him in which she stated that it was so cold that "her puppies had noses." Upon his inquiry regarding the meaning of that statement, she

explained that it meant that “she was cold and her nipples were swollen.”

(4) Once (complainant does not recall the date) while in the back of a van arranging equipment and preparing for a trip to a satellite office, Krebsbach poked him in the buttocks with a screen used as a background for photographs and said, “I always wanted to fuck you, but I really didn’t plan on doing it this way.”

(5) On another occasion, (complainant does not recall the date) while loading the van for travel, Krebsbach dropped or dislodged a case, and Dolezalek said to her, “If you didn’t have a cunt, what good would you be.”

(6) Between 1991 and 1993, Krebsbach hugged Dolezalek twice, kissed him once, and once scratched Dolezalek’s back and gave him a neck rub. Co-worker Dolezalek told inappropriate jokes.

(7) On March 23, 1995, Krebsbach showed him a Redbook magazine article entitled, “A Day in the Life of a Penis.”

In regard to allegation (1), complainant has failed to show that the alleged kisses were unwelcome, as required for a finding of sexual harassment. Complainant testified that he was kissed on the mouth by Krebsbach three times during the first two years of his employment at Rhinelander, i.e., 1986 to 1988, and that these kisses were unwelcome; and that he did not recall the dates of the other three unwelcome kisses, but the kissing incidents ceased “in the area around 1990,” after he told her “[he] didn’t care working with her and that [he] didn’t care for some of the activities.” Prior to 1990, complainant never informed Krebsbach that her kisses were unwelcome, and

complainant never reported the alleged conduct to a supervisor. Other evidence shows that complainant and Krebsbach were personal friends during this period (See Finding of Fact 4), which also militates against a conclusion that the alleged kissing incidents constituted sexual harassment under §111.36(1)(b) or §111.36(1)(br), Stats., i.e., conduct that is intimidating, hostile, or offensive.^M Moreover, as concluded below, this allegation was not timely filed.

In regard to allegation (2), Kubinek has failed to show that Krebsbach's hugs were unwelcome, sexual in nature, directed at him because of his sex (a requirement for sexual harassment under §111.36(1)(br), Stats.), or offensive or intimidating to him. Contrary to his testimony that Krebsbach never hugged women, other testimony provided a different view. Co-worker Gail Eaker, a female, testified to being hugged or hugging Krebsbach in the work place on many occasions: when she was upset about work and personal problems, when Krebsbach was crying after a conflict with complainant, and after not seeing each other for a while. Krebsbach grew up in Rhinelander, knew many people, and she hugged family and friends in the work place. It should also be noted, as discussed above, that complainant and Krebsbach were social friends during this period of time, exchanging gifts with each other, going out for drinks with Krebsbach's husband, going to Kubinek's parents' home, and doing favors for each other. This lends support to the conclusion that the hugs were not unwelcome, not sexual in nature, and not intimidating, hostile or offensive, as required for a finding of sexual harassment.

Kubinek's allegations with respect to Krebsbach's sexually explicit language and Dolezalek's inappropriate comments and jokes (allegations (3), (5), and (7)) are paradoxical. Complainant actively shared in the responsibility for the reputedly sexually hostile work environment. He told sex-based jokes^N of his own creation about clients, co-workers, and management. He made derogatory comments about three

^M Language in the proposed decision has been changed to conform more closely to the statutory language.

^N The proposed decision also refers to race and age-based jokes. The Commission has deleted this reference because in its opinion it is irrelevant to a sexual harassment claim.

female co-workers (including Krebsbach), using sexual epithets. He and Kay Javenkoski rumored that Krebsbach obtained her team leader position because she engaged in illicit sexual relations with a former supervisor. On more than one occasion, he was heard swearing at Krebsbach. Eaker testified that everyone on the Rhinelander team, except for one male co-worker, used profanity, including the "F" word. Complainant used the "F" word frequently. Kubinek was an active contributor to the distasteful environment—he engaged in it, did not discourage it, and did not voice rejection of the alleged comments and jokes to his co-workers or supervisors. Complainant's active participation prevents a finding that this conduct on the part of others, even if true, created an offensive working environment for him, even when considered as part of the totality of circumstances here.

Regarding allegation (4), in view of complainant's contribution to the offensive work environment, it is concluded that, even if this allegation were true, complainant did not feel intimidated or offended by it. As a result, complainant has failed to show sexual harassment in regard to this allegation, especially considering the totality of circumstances here.

As to allegation (6), Dolezalek testified that he neither kissed, nor was kissed by Krebsbach. He acknowledged being hugged by Krebsbach on only one occasion. According to Dolezalek, Krebsbach came into the breakroom, crying after a road test and "just needed a hug." No one other than complainant testified to observing Krebsbach and Dolezalek engage in the alleged conduct. It is also worth noting that complainant was not the target of the conduct but only an observer. It is concluded that the conduct, even if it occurred as alleged, which is doubtful given the evidence of record,^o is not sufficiently severe to satisfy the definition of sexual harassment even considering the totality of circumstances here.

The Redbook article incident, which is the subject of allegation (7), occurred on March 23, 1995. The Redbook magazine was initially introduced into the work place

^o The Commission has found that Krebsbach and Dolezalek were not involved in contact of a sexual nature.

by co-worker Susan Katzner who showed the article to other employees. Later, co-worker Kay Javenkoski also asked Katzner about it. Kubinek never told his supervisors about the March 23, 1995, incident, but two weeks later reported it the AAO, by a note dated April 9, 1995, to Equal Opportunity Specialist Hultman. Hultman reported Kubinek's complaint to bureau head Kussow. The incident was promptly investigated by management, and Krebsbach was disciplined with a one-day suspension without pay.

Krebsbach grieved this matter and the ring incident. (See Case No. 96-0006-PC-ER, below.) Respondent's disciplinary action was overturned in a decision by an arbitrator. The arbitrator determined the evidence did not support the charge of sexual harassment.^p The record shows that Kubinek was not averse to showing similar material to Krebsbach and other co-workers. For example, in spring 1995, after sexual harassment training had been provided to all Rhinelander team members, Kubinek showed Krebsbach and others, including Kay Javenkoski, a card, which stated, "Your story has touched my heart. Never before have I met anyone with more troubles . . . Please accept this expression of my sincere sympathy. Now fuck off and quit bothering me." In a teletype message to Krebsbach about co-worker Eaker, Kubinek, in reference to a prior telephone conversation he overheard between Eaker and Krebsbach, said that Eaker had put on "quite a performance" and that Eaker "should win 'the slut of the day' award." Considering Kubinek's own conduct and interchanges with Krebsbach, this charge appears little more than a sham. The evidence does not support a charge of sexual harassment.

Case No. 96-0006-PC-ER

Whether respondent discriminated against complainant on the basis of sex, including sexual harassment, when lead worker Krebsbach allegedly touched complainant on December 6, 1995.

^p The proposed decision states its agreement with the arbitrator's conclusion. The Commission has deleted this statement because of the fundamental differences between these two proceedings.

The evidence shows that on December 15, 1995, the recently hired supervisor initiated individual meetings with Rhinelander team members because she had noticed increased tension and hostility in that office. Kubinek, in his meeting, informed Hium that on December 6, 1995, in Eagle River, while waiting on a customer, he suddenly felt a hand on his left hip near his left pocket. It was Krebsbach's. Kubinek stated that when he asked Krebsbach what she was doing, she said she was putting her ring in his pocket for safekeeping because it was too cold outside to wear it. Kubinek stated that he gave the ring back to her when she returned from the road test. Hium met with Krebsbach on December 19, 1995. She acknowledged working with Kubinek in Eagle River on December 6, 1995. Krebsbach described the incident to Hium as follows:

I did put my ring in Bob's pants pocket for safekeeping. I didn't touch his thigh or leg. I just dropped the ring into his pocket. I did not put my hand in his pocket. I just didn't think that this could be a problem. I am sorry that Bob took this the wrong way. It was wrong of me to do this.

In a follow-up meeting with Kubinek on December 28, 1995, Hium informed Kubinek of her December 15, 1995, discussion with Krebsbach about the ring incident. Hium informed Kubinek that she gave Krebsbach instructions not to touch him in the future and that Krebsbach was willing to apologize.

District Manager Jandrin received a grievance from Kubinek on January 5, 1996. The grievance provided the following description of the ring incident:

On Wednesday, Dec. 6th 1995, I felt a hand touch my leg and then felt a hand in my left front pants pocket. I looked at the co-worker, Linda Krebsbach, who was doing this and said, 'What are you doing?' She replied she was leaving to conduct a road test and didn't want to wear her emerald ring outside in the cold. She placed the ring in my pocket and left for the road test.

Jandrin discussed the incident with Krebsbach on January 17, 1996. Krebsbach stated she inserted the ring in the slit of Kubinek's pocket without putting her hand in his pocket or pushing down into the pocket. When she returned and asked for her ring

back, Krebsbach stated that Kubinek joked about keeping it and getting a couple of bucks for it, but eventually gave her the ring. Krebsbach testified that, later that same day, Kubinek asked Krebsbach to arrange with Javenkoski to trade travel so Krebsbach could travel with him the next day. Javenkoski agreed to the trade, and Kubinek, as he requested, traveled with Krebsbach the very next day.

Kubinek never told Krebsbach that he was offended by the ring incident. Kubinek lodged his complaint against Krebsbach three days after Krebsbach had reported a December 12, 1995, confrontation ("shouting match") with Kubinek to management. The ring incident was promptly investigated by management, and, as a result, Krebsbach received a three-day suspension without pay. She grieved the suspension, and it was overturned in an umpire's arbitration decision. The arbitrator determined that Krebsbach did not sexually harass Kubinek, but showed poor judgment, and the imposed discipline was reduced to a written notice. In the context of the entire situation in the office, this incident would not be considered sufficiently severe or pervasive to support a finding of sexual harassment.^Q

Case No. 96-0052-PC-ER

Whether respondent retaliated against complainant for engaging in protected fair employment activities when supervisor Hium allegedly posted an article in the Rhinelander office and provided a copy to complainant in April of 1996.

The evidence shows that District Manager Linda Lewis read an article in the newspaper entitled, "Our Own Will Governs Which Way Attitudes Will Tilt." In the article, two fictional characters are described: Bob, "a bitter cynical, mad at the world sort of guy," and Shannon, who "finds something to twinkle about no matter what." The author asserts that attitude change is possible when you discover the free will to

^Q The Commission has deleted language in the proposed decision concerning management's prompt response to this incident because it is unnecessary to the decision.

choose your point of view of life, and that the choice is yours. Lewis thought the article to be a good one on attitudes, made copies for each of her supervisory areas, and put the copies in their mail bins. She did not instruct anyone to post the article. A program assistant at the Wausau area office received the article from Lewis and distributed it to the Rhinelander station. Supervisor Hium received a copy in her mail box at Wausau. She received no instructions from anyone regarding the article.

Hium noticed the article posted at the Rhinelander station. She had not instructed anyone to post the article and did not know who posted it. Kubinek queried Hium about the posted article and offered few, if any, comments, and did not tell her that he was offended by it. Hium told Kubinek the article was received at the Wausau station with a note to distribute it to the Rhinelander team.

Kubinek never complained to District Manager Lewis about the article. Lewis received no complaints from any of her area offices about the article. Kubinek complained directly to the Personnel Commission. After respondent was given notice of the complaint and filed an answer, Lewis met with Kubinek in private, removed the posted article from the supply cabinet, and informed Kubinek that she did not intend the article to be directed at him nor did she intend to offend him. At the time, Lewis supervised four other employes named Bob.

This record of the incident fails to establish that complainant suffered an adverse action by his employer, i.e., that the posting of the article had any concrete, tangible effect on his employment. In addition, no inference of retaliation was created since there were "Bobs" in the district other than complainant. Complainant has failed to show a prima facie case of retaliation. If he had, the burden would shift to respondent to articulate a legitimate, non-discriminatory reason for its action which it has done by explaining that District Manager Lewis felt that the article conveyed a positive message about attitudes which would be interesting to her subordinates in each of offices she supervised, and that the article was not directed at complainant. It is not apparent what complainant's pretext argument is in this regard. Lewis's distribution of the article to

all the offices under her supervision, including other offices with employees named Bob, supports a conclusion that pretext has not been demonstrated or retaliation shown.

Timeliness issue

During the investigative stage, respondent essentially moved to dismiss as untimely those allegations relating to incidents which occurred 300 days before the initial charges of discrimination were filed. §111.39(1), Wis. Stats. The motion was addressed in the Initial Determination(s) to the extent that respondent was advised to seek resolution of this motion at the hearing phase. During the course of the hearing, respondent renewed its motion.

The initial complaints of Javenkoski and Kubinek were both filed on August 1, 1995. The actionable period (300 days before filing, s. 111.39(1), Stats.) for both complaints started on October 5, 1994. Complainants attempt to avoid time-barred acts by alleging a continuing violation. "The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the time limitations period courts treat such a combination as one continuous act that ends within the limitation period." *Selan v. Kiley*, 969 F. 2d 560, 564, 59 FEP Cases 775 (7th Cir 1992). Kubinek in his complaint alleges that he received unwanted "hugs or kisses on or away from the job" from Krebsbach, starting in 1986 (shortly after he transferred to the Rhinelander team) and continuing until 1989. In testimony Kubinek stated the kisses—a total of six—stopped in 1990, but the hugs continued until later 1994. On cross-examination, Kubinek stated the kisses could have stopped in three years. Javenkoski charges in her complaint that "approximately five years ago [1990] two of our team members, Linda Krebsbach and Dick Dolezalek, were engaging in behavior of a sexual nature which created a poor and hostile work environment."

There are several continuing violation theories. See *Stewart v. CPC International, Inc.*, 679 F. 2d 117 (7th Cir. 1982). As applicable here, the question is whether the alleged acts of sexual harassment "were related closely enough to constitute a continuing violation" or were "merely discrete, isolated, and complete acts which must be regarded as individual violations." *Berry v. Board of Supervisors of L.S.U.*,

715 F. 2d 971, 981 (5th Cir 1983), as cited in *Selan, id.* The factors to consider in making this determination are: Do the alleged acts involve the same type of discrimination? Do the alleged acts occur frequently or are they more isolated? Does the act trigger an employe's awareness of harassment and a duty to assert his or her rights? *Id.*

Based on these criteria, the record does not support complainant Kubinek's's continuing violation theory as it relates to the alleged kissing incidents (issue 2., Case No. 95-0093-PC-ER). The alleged kisses were discrete, isolated acts, of a nature that should have immediately alerted Kubinek to what he now claims is sexual harassment, but about which he did nothing at the time. It is concluded as a result that the kissing allegation was not timely filed.

The Commission now turns to certain allegations raised by complainant Javenkoski which occurred prior to the actionable period (issue 2, case number 95-0092-PC-ER, as enumerated on pp. 25-26, above). Specifically, the following allegations occurred prior to the actionable period: Item 1 (comments in 1989-90 about Mr Moreland's butt), Item 3 (Mr Rudolph's report in November 1990, that he received an unwelcome kiss), Item 5 (Javenkoski in August 1993 observing Krebsbach and Dolezlek comparing sunburns), and Item 10 (Javenkoski's observance of some hugs). These alleged events are amenable to a continuing violation theory because each event standing alone is insufficient for complainant to conclude that discrimination occurred; rather, it is the repetition of such conduct which would alert her to the potential of discrimination occurring.^R

Other matters

In their objections to the Proposed Decision and Order, complainants argue that the totality of circumstances was not considered in reaching the conclusion that the record does not support a finding that an offensive work environment was created for either complainant. However, each incident of alleged harassment was analyzed within

^R This paragraph has been expanded for the purpose of clarification.

the context of the total office environment in which it occurred, which included the incidents of alleged harassment which complainants showed occurred as alleged.

Complainants also cite to the recent U.S. Supreme Court decisions governing an employer's liability for the actions of a supervisor, arguing that Krebsbach, even though designated a lead worker, functioned as a supervisor. *See, Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998). However, such liability attaches only if a conclusion is reached that an actionable hostile environment was created. No such conclusion was reached here.

ORDER

Case Nos. 95-0092-PC-ER, 96-0005-PC-ER, and 97-0201-PC-ER

These complaints are dismissed.

Case Nos. 95-0093-PC-ER, 96-0006-PC-ER, and 96-0052-PC-ER

These complaints are dismissed.

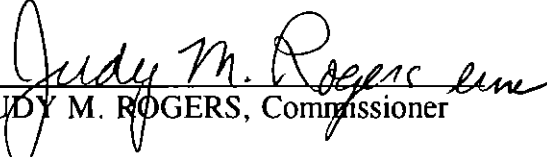
Dated: September 11, 2000.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:LRM:rcr:950092C+dec1.2


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Kay Javenkoski	Robert Kubinek	Terrence Mulcahy
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Three Lakes, WI 54562	Three Lakes, WI 54562	PO Box 7910
		Madison, WI 53707-7910

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