STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES A. ZIMMERMAN, *Complainant,* **v.** **Secretary, DEPARTMENT OF CORRECTIONS,** *Respondent.* Case No. 98-0071-PC-ER	RULING ON RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

NATURE OF THE CASE

On March 30, 1998, complainant filed a discrimination complaint with the Personnel Commission alleging respondent discriminated against him because of sex (male), in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. This ruling addresses respondent's motion to dismiss for failure to state a cause of action filed on July 15, 1999. Both parties have submitted written arguments. The following findings appear to be undisputed

FINDINGS OF FACT

1. Complainant is a man, who has been employed as a Sergeant at Dodge Correctional Institution (DCI) during the time relevant to this complaint.

2. In 1998, respondent received a complaint from a female officer that alleged, among other things, a Sergeant Zimmerman made a sexually derogatory comment to her about women employed at DCI. The Office of Diversity and Employee Services investigated the complaint.

3. In a memo dated February 11, 1998, complainant was notified by Office of Diversity Complaint Investigator, Susan Waters, that he had been named in a harassment/discrimination complaint. Ms. Waters scheduled an interview for February 12, 1998. The memo advised complainant not to discuss the investigation or the interview notification with other employes, and informed him that the interview was "not of a disciplinary nature;" thus, he was not entitled to, but could have a union representative present at the interview.

Complainant was further advised that the allegations, if proven, could lead to a disciplinary investigation.

4. On February 12, 1998, Susan Waters and John Richards, DCI Unit Manager, interviewed complainant. Union Steward, Dan Herringa, accompanied complainant. In response to a question as to whether respondent had the right Sgt. Zimmerman, Ms. Waters said that complainant was the right Sgt. Zimmerman.

5. At some point in the investigative process respondent determined that due to a mistake, complainant had erroneously been implicated in the harassment complaint, and that complainant was not the same Sgt. Zimmerman that had been named in the complaint.

6. Subsequently, on April 2nd and 27th, 1999, respondent advised complainant verbally, and then in writing, that it was a different Zimmerman who had been named in the complaint, and that complainant would not be disciplined. Respondent also apologized to complainant.

CONCLUSION OF LAW

This complaint fails to state a claim under the WFEA because respondent did not deliberately take any adverse employment action against complainant.

OPINION

This case involves a complaint of sex discrimination under the WFEA. For there to be any liability under the WFEA, it must be established there was an adverse employment action, *see Klein v. DATCP,* 95-0014-PC-ER, 5/21/97, and that "the employer acted intentionally because of the employe's protected status." *Stark v. DILHR,*90-0143-PC-ER, 9/9/94.

In the case now before the commission, it is undisputed that respondent acted negligently when it caused the investigation of complainant with regard to an internal sex harassment complaint which accused a Sgt. Zimmerman of having sexually harassed the complainant. Since the employer acted negligently on the basis of mistaken identity, there was no deliberate action, and there is no viable claim under the WFEA.

In his written argument in opposition to dismissal, complainant asserts the sex harassment complaint also named a female officer, and that she was exonerated at her investigative interview, while in complainant's case exoneration took several weeks. In *Klein,* the commission held that as a matter of law the one sexual harassment investigation against the complainant did not constitute an adverse employment action: "While it is safe to assume that any allegation of employe misconduct will result in some degree of stress, we are dealing here with a single incident, which did not result in the pursuit of any disciplinary action against complainant. It has been recognized in somewhat analogous contexts that isolated actions are unlikely to result in a finding of a hostile work environment." (footnote and citation omitted). In that case the employe was not cleared for about a month after notification. There are no circumstances here that would lead to a different result.[1]

In his arguments in opposition to the motion to dismiss, complainant also, for the first time, raises an allegation of age discrimination: "Mr. Richards [complaint investigator] discriminated against me when he picked me because I work a lot of overtime. I work a lot of overtime because I am nearing retirement age. Therefore, I was discriminated against because of my age." This allegation does not support a viable claim of age discrimination. Again, it is undisputed that complainant was implicated in the sex harassment complaint because of negligence. Thus it is clear that Mr. Richards did not deliberately discriminate against complainant because of complainant's age, and an essential element for a claim of this nature is missing. Furthermore, without belaboring the point, the chain of causation complainant tries to create here stretches way beyond the breaking point—i. e., there can be no actionable claim or proximate cause under these circumstances.

The complainant has raised a number of other issues concerning how the complaint was investigated and how respondent has responded to his requests for information. These are not material to the discrimination claim and will not be addressed.

---

[1] In this case, Mr. Zimmerman alleges he suffered a tension headache as the result of stress induced by the charge against him. This is similar to the situation in *Klein*, where the commission held it could not be inferred that "a reasonable employe similarly situated to complainant would experience the handling of this one predisciplinary process as a hostile work environment."

In conclusion, it of course is unfortunate that complainant had to undergo the accusation and investigation of sexual harassment. However, the bottom line is that the WFEA does not address inadvertent actions such as this, and the commission can not serve as a forum for Mr. Zimmerman's complaint.

ORDER

This complaint is dismissed because it does not state a claim under the WFEA.

Dated: August 25, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:980071Crul1.doc

Parties:

James Zimmerman
124 S State St
Waupun, WI 53963

Jon Litscher
Secretary, DOC
149 East Wilson St.
P. O. Box 7925
Madison, WI 53707-7925

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