STATE OF WISCONSIN PERSONNEL COMMISSION

KAHTAN AL YASIRI,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Platteville),
Respondent.

Case No. 98-0110-PC-ER

FINAL DECISION AND ORDER

KAHTAN AL YASIRI,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Platteville),
Respondent.

Case No. 98-0129-PC-ER

INTERIM DECISION AND ORDER

A hearing was held in the above-noted cases on September 25-27, 2000. A proposed decision and order (PDO) was mailed to the parties on February 12, 2001. Both parties filed objections, each by cover letter dated March 22, 2001. Respondent filed a response to complainant's objections by cover letter dated April 2, 2001. On June 11, 2001, complainant's attorney requested permission to submit additional materials for the Commission's consideration. This request was granted over respondent's objection. Shortly thereafter, respondent's attorney requested permission to submit additional materials and this request was granted without objection. Complainant filed his additional materials on June 14, 2001, while respondent tendered its additional materials on June 15, 2001.

The Commission has reviewed the objections filed by the parties and has consulted with the hearing examiner. The Commission agrees with the hearing examiner's credibility assess-

ments, has corrected errors in the PDO and incorporates other changes to reflect the Commission's legal analysis. Changes are denoted by alphabetical footnotes.

The parties agreed to a statement of the issues for hearing (see Conference Report dated August 25, 2000). Complainant withdrew all but two allegations prior to hearing. The remaining allegations are shown below:

> Case No. 98-0110-PC-ER: Whether complainant was retaliated against for engaging in protected fair employment activities in January 1998, when complainant received negative performance evaluations from his peers.
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> Case No. 98-0129-PC-ER: Whether there is probable cause to believe complainant was retaliated against for engaging in protected fair employment activities with respect to the incident on June 15, 1998.

FINDINGS OF FACT

1. Complainant has been a tenured faculty member in the Department of Economics at the University of Wisconsin-Platteville since 1965. From 1966 to 1994, he served as the Dean of the College of Business and Economics, which was reorganized during this time and renamed the College of Business, Industry and Communications (BIC), which included the Department of Economics. He was on leave from the deanship from July 1, 1993 to June 30, 1994. On September 1, 1994, he returned to a tenured teaching position as a member of the Department of Economics, where he remains.

2. In 1994, when complainant returned as a member of the faculty of the Department of Economics, other faculty members included Drs. Ann Al Yasiri (complainant's wife), Farhad Dehghan, John Ifediora, Terry Liska, Brian Peckham, Gary Simonsen and Abdol Soofi.

3. When complainant was Dean (prior to 1994) he became aware that there was high turnover of students enrolled in Dr Soofi's classes. He met with Dr Soofi about this.

4. In 1983-84, when complainant was still Dean, the Department of Economics did not renew Dr. Soofi's contract. He had difficulties with students and peers and, in particular, with the Department Chair Dr. Soofi filed an appeal and prevailed which lead to his reinstatement in the Department.

5. Complainant recognized Dr. Soofi's potential and met with him explaining the academic world and discussing how to act appropriately with colleagues and students. From 1983-1987 when complainant was Dean, they met a number of times for as long as 3 hours a session.

6. In 1989, when complainant was Dean, Drs. Soofi, Peckham and Dehghan filed an internal nepotism complaint against complainant alleging (among other things) that he used his influence as Dean to secure preferential treatment for his wife in the Economics Department. The complaint was investigated and was determined to be without foundation and, accordingly, was dismissed. In response, complainant and his wife filed a defamation claim against Drs. Soofi, Dehghan and Peckham. The defamation lawsuit was settled sometime during complainant's tenure as Dean.

[A]7 Concerns continued to exist regarding Dr. Soofi's temper and intimidating behavior towards students and colleagues, which caused stress and fear, as summarized below:

a. On May 3, 1989, the CRST provided Dr. Soofi with a written explanation for its recommendation that he receive an "inequity raise" (Exh. C-13) In a section entitled "Abusive, Threatening, and Belligerent Conduct," it was noted that Dr Soofi engaged in "heated arguments with other faculty members and threatened them with physical harm" because they did not agree with his viewpoints (Exh. C-13, p. 3). The Committee also summarized Dr Soofi's problems with students (Exh. C-13, p. 4) including berating a student and ordering him to leave class due to disagreement over a political viewpoint and berating another student for 20 minutes in front of the entire class causing "severe emotional distress." The same section of the report also expressed concern that Dr Soofi's "views are not consistent with commonly accepted views of normal professional behavior."
b. On September 29, 1989, Dr Liska wrote to the Chancellor and Vice Chancellor relaying a student complaint that Dr. Soofi had used class time to inform the students of his opinion that Mrs. Al Yasiri was unqualified to teach (Exh. C-9).

[A] This paragraph was changed to include a brief description of the concerns reported about Dr. Soofi's behavior rather than a mere citation to exhibits.

c. On April 30, 1990, a student summarized an incident concerning Dr Soofi's perceived attempt to use the student "as a pawn" to further Dr. Soofi's arguments against Mrs. Al Yasiri's teaching competence (Exh. C-11, also see Exh. C-12).

d. Dr Klawiter works on the Platteville campus and, in 1992, was Chair of the CRST On October 9, 1992, he wrote to Ms. Lyall, President of the UW System (Exh. C-5), as a follow-up to prior correspondence regarding Dr Soofi. In the October 9th letter, he indicated that Dr. Soofi's "hostility has taken the form of not only an arrogant and belligerent attitude, but also outright physical threats to people as well as verbal harassment of students and colleagues" (Exh. 5, p. 1). He further noted that Dr Soofi, in a meeting with the CRST which was tape recorded, threatened the Committee members declaring: "I know how to take care of my enemies" and then identifying Members of the Committee and the Dean as his enemies (Exh. C5, p. 2). Dr Klawiter further expressed concern that Dr Soofi perceives his unacceptable behaviors as normal.

e. In January 1993, Dr Soofi yelled at and physically ejected a minority student from his office (Exh. C-14).

f. On February 15, 1993, eight professors in the Economics Department wrote to the Chancellor (Exh. C-10) requesting his intervention so they could "conduct departmental business without fear of harassment or intimidation by Professor Abdol Soofi."

g. In the fall of 1993, a student complained (Exh. C-3, pp. 2-4) because Dr Soofi had not objected to her advance notice that she would be gone for a class yet he ridiculed her to the point of tears when she later asked for help on a math problem. A second student complaint was filed in the fall of 1993 (Exh. 3, pp. 5-13) saying that the classroom atmosphere was hostile. Respondent investigated both complaints acknowledging that some students found the class environment hostile but noting there was insufficient evidence to conclude that Dr Soofi "deliberately created" a hostile environment (Exh. C-4).

8. A tenure decision was pending for complainant's wife. In January 1996, Drs. Soofi and Dehghan voted against her tenure. She filed a complaint with the Personnel Commission (Case No. 96-0110-PC-ER) alleging marital status and gender discrimination in regard to Drs. Soofi and Dehghan's opposition to her tenure. Dr. Soofi knew complainant's wife filed the complaint and that complainant was "supporting" and "participating" in her complaint.[B]

Case No. 98-0110-PC-ER Peer Evaluations

9A.[C] The peer evaluation process begins in January of each year when each faculty member is given time to prepare a file of their achievements for the prior year. Once the file is prepared, the faculty member's peers are expected to review the file and complete an evaluation that also is placed in the file. The department chair coordinates the process and, upon completion, submits the files to the Department Review Board (DRB). The DRB forwards the files to the College Rank, Salary and Tenure Committee (CRST). After merit decisions are made, the files are returned to the appropriate college dean for distribution to the faculty. The DRB sends each faculty member a letter about the merit-raise decision and a faculty member who is unhappy with the decision may ask for an opportunity to file additional materials for a second review and decision.

9. In January 1997, the Department of Economics went through a peer evaluation exercise the results of which had the potential to impact on complainant's merit awards. The categories evaluated were a) teaching effectiveness, b) scholarly and professional activities, c) university service and d) community service. The performance ratings were marked according

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[B] This paragraph was changed to correct an error. Specifically, the complainant did not submit documents to the Personnel Commission as support of his wife's discrimination complaint. Dr. Soofi acknowledged when he testified that he thought complainant was "supporting" Ms. Al Yasiri's complaint. Dr. Curtis assisted respondent's legal office in gathering documentation about Ms. Al Yasiri's complaint, including responses prepared by Dr. Soofi. Dr. Curtis testified that Dr. Soofi was aware of complainant's "participation" in his wife's complaint. (Hearing tape 5, counter at about 125) Dr. Dehghan did not testify whether he thought complainant supported his wife's complaint. Complainant did not explain at hearing how he supported or participated in his wife's complaint.

[C] This paragraph was added to clarify the merit award process.

to the following scale: low, below normal, normal, above normal and outstanding. Peer evaluations are given with the understanding that they would remain anonymous.

10. Dr Soofi rated complainant low in every category (Exh. C-1, p.3). Dr Dehghan rated complainant low in all categories except university service which he ranked as below normal (Exh. C-1, p. 5). These ratings were unjustifiably low.

11. Terrence Liska was the Chair of the Department of Economics from 1988-1997 He also served as Chair of the Department's Review Board (DRB). The DRB was responsible, among other things, for the peer review process. [D]

12. Dr Liska reviewed the peer evaluations for complainant. He saw the low rankings from Drs. Soofi and Dehghan, knew the rankings were too low and suspected the rankings were based on factors other than a fair review of complainant's achievements. He compiled two summaries of the overall rankings complainant received (Exh. C-1, pp. 1-2) and noted on each summary that he questioned the low evaluations for complainant's performance. He forwarded the summaries with the stated notation to the CRST, along with the underlying peer evaluation forms completed for complainant.

13. In 1997, the CRST reviewed the materials from the DRB and determined whether each professor's achievements were meritorious or not. Complainant's achievements were determined to be meritorious. As a result, he received the highest merit award possible. [E]

[F]14. The peer evaluation forms described in the preceding paragraphs were completed in January 1997, not in January 1998, the year mentioned in the hearing issue.

[D] This paragraph was changed to exclude information covered in the newly-created ¶9A.

[E] This finding was based on Dr. Curtis's testimony that for the last couple years he was at Platteville (he retired on 7/1/98), the choice was either to give merit or not (hearing tape 6 at about 862) and on Dr. Stokes' testimony that complainant received a merit increase in 1997 and 1998 (hearing tape 9 at about 300). (Complainant did not know what impact the poor evaluations had on his merit in 1997. Hearing tape 8 at about 2700.)

[F] The wording of this paragraph was changed to conform to the language of the agreed-upon statement of the issue for hearing.

14A. [G] The evaluations would have been placed in complainant's file for the first time in January 1997, but he did not notice them until January 1998 (complainant's testimony, hearing tape 6 at about 2100). He could have noticed them sooner but did not check his file.

14B. [H] Complainant was concerned that the poor evaluations could affect his reputation on campus because copies of the evaluations are placed in the library and are accessible by students.[I] Complainant also expressed concern that the evaluations could have a negative impact on outside employment opportunities. It is not uncommon for prospective employers to inquire about peer evaluations and for the current employer to provide the requested information. Complainant last applied for an outside position in 1998, and there is no evidence that the prospective employer requested information about his peer evaluations or that the poor evaluations in 1997 had any impact on that employment opportunity.

Case No. 98-0129-PC-ER June 15, 1998 Incident

15. Complainant filed his first complaint with the Commission on June 4, 1998 (Case No. 98-0110-PC-ER).[J] The Commission mailed a copy of the complaint to respondent by cover letter dated June 9, 1998.

16. On Monday morning at 9:30 a.m. on June 15, 1998, complainant was in the Economics Department making copies of materials for a conference scheduled to begin on June 25, 1998. No one else was at work (school was not in session). He was in the mail/copy room when Dr Soofi came in and retrieved his mail. Dr. Soofi stared at complainant. Complainant continued with his copying chore. Dr. Soofi left the room for about 10 seconds and returned. Dr Soofi said: "May I ask you a question, Mr. Al Yasiri?" Complainant looked up

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[G] This paragraph was added as necessary to address an argument raised in complainant's objections to the PDO (3/22/01 brief, pp. 2-3). There is no evidence in the record that complainant's access to his own file was limited or that respondent was responsible in any other way for the fact that complainant did not see the poor evaluations until January 1998.

[H] This paragraph was added to address complainant's claimed impact of the poor evaluations.

[I] There is no evidence that any student reviewed the library copy of the poor evaluations.

[J] This sentence was changed in recognition of the parties' dispute over the existence of a protected activity in Case No. 98-0110-PC-ER.

startled. Dr Soofi's face was "blue and dark" [K] His eyes bulged at complainant. Complainant responded: "Yes, sir." Dr. Soofi said: "What did you do with the travel money in my account?" Complainant responded: "I don't know what you are talking about." Dr. Soofi said there was money allotted for his travel and asked: "Where is it?" Complainant repeated that he did not know anything about it and suggested that Dr. Soofi ask the Dean or Bill Stint, the financial officer. Dr. Soofi then advanced towards complainant with his (Dr Soofi's) arms extended "like a bear." [L] Dr Soofi was enraged and agitated. Complainant began to retreat. Dr Soofi referred to complainant with profanities such as, "Fucking coward." "You filed complaints. I will see you in court, you fucking coward." As Dr. Soofi spoke his spittle landed on complainant's face. Complainant again retreated towards an exit to the hallway. Dr Soofi followed and blocked complainant's way to his (complainant's) office. Dr Soofi continued with a barrage of verbal abuses such as: "I'm going to screw you." Complainant felt threatened. He retreated through an adjacent building to his car.

17 Complainant stood next to his car wondering what to do. He had left his conference materials at the copy machine. He experienced chest pains and nausea. John Ifediora, complainant's colleague in the Department of Economics, chanced upon complainant. Dr Ifediora knew complainant as having an outgoing personality. On this occasion, complainant looked subdued and shaken. He asked complainant what was wrong but complainant was reluctant to tell him. Complainant paced back and forth. He said he had had an encounter with Dr. Soofi. They went to Dr. Ifediora's office and talked about it. Complainant remained shaken. He stayed at Dr. Ifediora's office for about 5 minutes to calm down. Dr Ifediora was concerned to the extent that (with complainant's permission) he telephoned complainant's wife and called complainant later the same day to ensure he was okay. Complainant went home after leaving Dr. Ifediora's office and threw up. He had to lie down. He later completed the

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[K] This sentence was changed by placing the phrase "blue and dark" in quotes to reflect that these were the words used by complainant when he testified. The Commission took the words to mean that Dr. Soofi's face was flushed with anger.

[L] This sentence was changed by placing the phrase "extended like a bear" in quotes to reflect that these were the words used by complainant when he testified. The Commission took the words to mean that Dr. Soofi's arms were extended in a threatening manner.

copying at a local store rather than risk exposure to another incident with Dr Soofi at work.[M] He felt hampered in his ability to prepare for the conference but he attended and completed his tasks. He has performed his work tasks since the incident and has avoided contact with Dr Soofi.

18. Complainant reported the June 15, 1998 incident to Associate Vice Chancellor Curtis some time prior to June 23, 1998 and from such report Dr. Curtis knew that at least part of the rage directed at complainant was Dr Soofi's resentment that complainant filed a complaint with the Personnel Commission.[N] No one talked to Dr. Soofi about the incident or told him that his actions appeared to have been taken in retaliation for complainant's filing a complaint with the Personnel Commission or that such conduct was illegal or inappropriate.

19.[O] Associate Vice Chancellor Curtis knew of the personnel conflicts within the Economics Department at UW-Platteville. He thought transferring a faculty member out of the department could ease tension. He first investigated the possibility of reassigning Dr Soofi to teach in another department but the other department rejected the idea. In May 1998, Dr Curtis spoke with the Vice Chancellor at UW-Milwaukee to see if there was an opportunity to reassign Dr Soofi there for a research appointment. In June, Dr Soofi said he would be interested in being reassigned to the Milwaukee campus. Dr. Soofi's transfer to the UW-Milwaukee occurred in the fall of 1998, and he continued to work there up to the time of hearing. It is expected that he will return to the Platteville campus for the fall semester of 2000. Even when assigned to the Milwaukee campus, Dr. Soofi has maintained a presence on the Platteville campus returning to his office once or twice a week on average. Dr Soofi was never informed that a purpose of the temporary assignment was to remove him from the Platteville campus due to his unacceptable behaviors. In fact Dr Soofi was led to believe that the temporary assignment was made to enable him to conduct research.

[M] This and the following sentences were added as necessary to the Commission's decision rationale.
[N] This sentence was changed to provide the date complainant reported the incident, the name of the person to whom he reported it and the nature of what was said.
[O] This paragraph was changed to provide more information about Dr. Soofi's transfer.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these cases pursuant to §230.45(1)(b), Stats.

2. It is complainant's burden in Case No. 98-0110-PC-ER, to establish by a preponderance of the evidence that respondent retaliated against him for engaging in protected fair employment activities in January 1998, when he received negative performance evaluations from his peers. He failed to meet his burden of proof.

3. It is complainant's burden in Case No. 98-0129-PC-ER to establish probable cause to believe he was retaliated against for engaging in protected fair employment activities with respect to the incident on June 15, 1998. He met his burden in this case.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

A. Case No. 98-0110-PC-ER

Complainant contends he was retaliated against in January 1998, when he received negative performance evaluations from Drs. Soofi and Dehghan. This case was heard on the merits, meaning it was complainant's burden to show by a preponderance of the credible evidence that discrimination occurred as alleged.

A prima facie case of retaliation is established if there is sufficient evidence showing that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence

that a retaliatory motive played a part in the adverse employment action. *Chandler v. UW-LaCrosse*, 87-0124-PC-ER, 8/24/89. [P]

[Q]The FEA provides (§111.322(3), Stats.) that it is unlawful to 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 the FEA. Complainant provided no testimony detailing what action he took to support or participate in the discrimination case his wife filed with the Commission. Instead, he relies on testimony from other witnesses as detailed in the footnote to ¶8 of the Findings of Fact. The parties dispute whether the record is sufficient to establish the first element of the prima facie case. It is unnecessary to resolve this dispute. Accordingly, the Commission presumes for the subsequent discussion (without resolving the matter) that the first element was established.

[R]Complainant failed to establish the second and third elements of the prima facie case because the peer evaluation forms presented as evidence at hearing pertained to merit awards in 1997, not in 1998. Complainant disagrees stating as noted below (objections dated 3/22/01, p. 1):

> The complainant does not object to the finding that the objectionable peer evaluations given to complainant by his colleagues, Abdol Soofi and Farhad Dehghan, occurred in January 1997 Complainant does object, however, to the conclusion that complainant failed to establish a prima facie case because the objectionable peer evaluations were given in January 1997 rather than in 1998, and to the dismissal of his claim on the merits based on that conclusion.

Complainant contends the Commission should analyze all issues in the case despite complainant's failure to have the 1998 evaluations in evidence, stating (objections dated 3/22/01, p. 2):

> [O]nce the respondent offers a legitimate, nondiscriminatory reason(s) for its conduct, the issue of proving a prima facie case falls out of the analysis. At that

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[P] The case citation was added.

[Q] The discussion of the first element of the prima facie case has been expanded from the PDO as well as addressed in a separate paragraph. These changes were necessary in light of the examiner's erroneous view of the record, as noted in ¶8 of the Findings of Fact and the related footnote.

[R] This and subsequent paragraphs were added to address complainant's objections to the PDO.

> time, the decision maker is to proceed to decide whether the complainant has proven that the reasons were a pretext for discrimination
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> At this point, the Commissioner should have proceeded to deal with the question of whether or not (respondent's) proffered reasons were a pretext for discrimination rather than simply to dismiss the case based on complainant's failure to establish a prima facie case.

Complainant cites *U.S. Postal Service Board of Governors v. Aikens*, 460 U.W 711 (1983), to support his proposition that since a hearing was held all issues should be addressed even if a prima facie case is not established. The Commission has never interpreted *Aikens* in the manner urged by complainant. In *Lorscheter v. DILHR*, 94-0110-PC-ER, 4/24/97, the Commission noted as follows (pp. 3-4):

> In discrimination cases of this nature, the initial burden of the complainant is to show a prima facie case—i. e., facts which, if unrebutted, have a tendency to show that discrimination has occurred. Respondent then must articulate a non-discriminatory rationale for its action which complainant then must try to prove constitutes a pretext for unlawful discrimination. Since the case has been fully heard on the merits, the Commission will not dwell on whether complainant established a prima facie case, but will proceed directly to the question of whether the respondent's explanation for its decision not to extend complainant's retirement date was actually a pretext for age discrimination. *See U. S. Postal Service Bd. Of Governors v. Aikens*, U. S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983).
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> The record evidence in this case shows that respondent was unable to have extended complainant's retirement date because of budgetary constraints.

In the instant case, the problem with complainant's showing transcends the mere question of whether there is a prima facie case. Since complainant can not show that there were allegedly retaliatory performance evaluations in 1998, he can not show that there was an essential element for FEA liability – i. e., an adverse employment action against him[5] – during the actionable period (300 days before the complaint was filed). In *Unites States Postal Serv-*

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[5] *See Dewane v.* UW, 99-0018-PC-ER, p. 3, 12/3/99, citing *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97 for the proposition that "In order to prevail on a claim of discrimination or retaliation under the FEA, a complainant is required to show that he or she was subject to a cognizable adverse employment action.

ice v. Aikens, the prima facie case element at issue was whether complainant had established that he was as qualified or more qualified than the employees who were promoted. Analysis of this question involves the same subject matter as the issue of pretext.[T] What complainant, in effect, seeks to do is to use an inapposite principle of law to bootstrap a subject which is outside both the issue for hearing and the actionable period for timely claims.

It appears complainant is suggesting that since neither party realized before hearing that the evaluations pertained to 1997, complainant should be allowed to use the 1997 (wrong) documents as evidence pertaining to January 1998. If this is his argument, it is rejected. Complainant's position is inconsistent with the fact that he has the burden of proof. It was up to him to present evidence at the hearing that respondent took an adverse action against him during the actionable period and within the parameters of the stipulated issue for hearing. Also, he cited no authority to support his suggestion and the Commission is unaware of such authority.

Complainant also attempts to shift responsibility from him for having the wrong (1997) evaluations at hearing (3/22/01 brief, pp. 2-3). His arguments ignore the facts that he knew in January 1997 that the peer evaluation process was underway and that he could have accessed his personnel file to look at his peer evaluations but did not do so until 1998. This is not a situation where respondent was asked in discovery to produce the evaluations completed in 1998 and, after they were produced, complainant relied on that representation only to find at hearing that the evaluations pertained to 1997 The situation is reversed. It is complainant who obtained the evaluations from his own file and mistakenly represented to respondent that they pertained to 1998.

[T] The Commission noted in *Klein v. DATCP*, 95-0014-PC-ER, p. 5, footnote 1, as shown below:

> In this case, [the adverse action] element of a prima facie case is also an element of a claim of retaliation. Therefore, the establishment of a prima facie case is of more significance than in a case where the only significance of the prima facie case is in its role as a tool of analysis, and where once the entire case has been tried on the merits, and the parties have fully tried the question of whether the employer's action was pretextual, the question of whether a prima facie case has been established "is no longer relevant." *U.S. Postal Service Bd. Of Govrs. V. Aikens*, 460 U.S. 711, 715, 75 L.Ed. 2d 403, 140, 103 S. Ct. 1478 (1983).

Complainant further attempts to place blame for his own mistake on respondent. He first notes that the evaluations were not returned to staff, and this statement, apparently, is based on his testimony that he saw the 1997 evaluations for the first time in 1998. Even if this representation were taken as true, he was aware of the time period for peer reviews because he participated in them as a faculty member. He also knew that he could see the evaluations in his own file yet, for no reason attributable to respondent, he did not check his file until January 1998.

Complainant also faults respondent for failing to object to the evaluations during the course of the hearing. It was clear at hearing that such objection was not waived. The first three hearing witnesses (Drs. Culbertson, Ifediora and Klawiter) testified about the documents as if they pertained to 1998. Dr. Liska was the next witness and he testified that he reviewed the documents as Chair of the Economics Department in January of 1997. (Direct examination, hearing tape #3 at about 579 and again at 633). On cross-examination, respondent's attorney stated that the year in which the evaluations were completed was an "item to be cleared up." (Hearing tape #3 at about 1695.) Respondent's cross-examination included further exploration of which year the evaluations were written. (Hearing tape #3 at about 1781.) It is apparent that, prior to hearing, respondent relied upon and did not question complainant's representation that the evaluations he offered as evidence were completed in January 1998. Under these circumstances, respondent's conduct cannot be interpreted as some form of waiver.

Complainant also offered the following argument (3/22/01 brief, p. 3):

> Additionally, to fault complainant under these circumstances seems fundamentally unfair given the fact that it was the respondent who was in a position to determine when these peer evaluations were issued simply by investigating and asking Soofi and Dehghan when they were issued and why. Instead, Dr. Curtis completely ignored complainant's request for an investigation. It is also noteworthy that not until the respondent's post-hearing brief did respondent argue that the date that complainant had ascribed to the offending peer evaluations was incorrect and that the correct date was January 1997.

The above argument fails to acknowledge that as part of their hearing preparation, either party could have opted to investigate (informally or through discovery) rather than wait until the hearing to obtain clarification. Both parties should have known that a question existed due to

the following handwritten notation on one of the evaluation forms (Exh. C-1, p. 2): "I question these evaluations T.L **1/31/97**" (emphasis added). Complainant knew or should have known that "T.L" was Dr Liska, a member of the Economics Department since 1987 and Department Chair from 1988-1997 (see ¶11, Findings of Fact) and, accordingly, Dr. Liska would not have made a notation pertaining to 1998 peer evaluation when he was no longer chair. Certainly it was within complainant's power to ask his colleague about the notation yet this was not done until the hearing. Dr. Liska brought his handwritten notation to the parties' attention and confirmed that the documents were completed in 1997

It is appropriate to consider whether the complaint should be amended in view of the fact that the evaluations were completed in 1997 and not in 1998 as complainant had surmised. Complainant has made no specific request to amend his complaint but his objections to the PDO may be interpreted as such. The potential amendment would be as shown below:

> Whether complainant was retaliated against for engaging in protected fair employment activities in January ~~1998~~ 1997, when complainant received negative performance evaluations from his peers.

Amendments are governed by §PC 2.02 (3), Wis. Adm. Code, the text of which is shown below:

> A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

Even if it were deemed appropriate to relate the amendment back to the initial filing date of June 4, 1998, the claim would be untimely. Complaints must be filed no more than 300 days after the alleged discrimination "occurred" (§111.39(1), Stats.). The negative evaluations in the record were completed in January 1997, which was more than a year before the complaint was filed.

Complainant also argued as noted below (3/22/01 brief, pp. 3-4):

> Finally, the Rules of Civil Procedure provide that "[I]f issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Sec. 802.09(2), Wis. Stats. Further, the Rules provide that "[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial on these issues." (*Id.*) Further, "[i]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense on the merits." (*Id.*)

The text of the referenced and related statutory provisions are shown below:

> **802.09 Amended and supplemental pleadings.** (1) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires. A party shall plead in response to an amended pleading within 45 days after service of the amended pleading unless (a) the court otherwise orders or (b) no responsive pleading is required or permitted under s. 802.01(1).
>
> (2) AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.
>
> (3) RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and,

> within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have know that, but for a mistake concerning the identify of the proper party, the action would have been brought against such party.

Complainant concedes that the above statute does not pertain to proceedings before this Commission (objections dated 3/22/01, p.4). The Commission does not need to address the question of whether the principle underlying the statute should be applied in the instant context, because even if the statute did pertain, any resulting amendment would be untimely. As noted previously, the negative evaluations were completed in January 1997, which was more than a year before the complaint was filed.

B. Case No. 98-0129-PC-ER[U]

Complainant contends he was retaliated against with respect to his confrontation with Dr Soofi on June 15, 1998. While the hearing issue does not mention harassment, it is clear from post-hearing briefs that this was the theory pursued by the parties (see, for example, pp. 16-19 of complainant's post-hearing brief dated 11/22/00 and pp. 15-18 of respondent's brief dated 12/22/00).

The Commission notes that this case was heard not on the merits but at the lower probable cause level of proof. In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. §PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

The Seventh Circuit has recognized claims of harassment premised upon an employee's participation in a protected activity. In *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir 1996), the Court was asked to review the appropriateness of certain jury instructions including:

[U] This section was revised to reflect the Commission's rationale.

> An employer acquiesces in retaliatory harassment by co-workers when the employer knows of the harassment and fails to act promptly to take actions reasonably likely to remedy the harassment and prevent future episodes.

Id., at 1332-1333.

The *Knox* Court found no fault with the above jury instruction reasoning as follows:

> The issue on which the State focuses to support its claim that the jury should not have been given this case is the necessary link to the employer's action. Its objection appears to have been based on the theory that fellow employee action can *never* be enough to hold an employer liable under Title VII, no matter what the surrounding circumstances. If this is what the State was saying, then it is wrong. It is well established that an employer can be held liable under Title VII for sexual harassment by an employee's co-workers if the employer had actual or constructive knowledge of the harassment and failed to address the problem adequately. [Citations omitted.] In *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), this court held an employer liable under Title VII for failing to deal effectively with what it knew to be a vicious campaign of racial harassment by co-workers against Hunter and other Black workers. These cases show that in general, an employer may be responsible for co-worker actions if it has the proper notice or knowledge of the problem. Although each one of them deals with a direct claim of harassment by coworkers, there is nothing to indicate that the principle of employer responsibility does not extend equally to other Title VII claims, such as a claim of unlawful retaliation. In brief, there are two questions: (1) is the right link established between the employer and the co-workers, so that the employer can be held responsible for their actions, and (2) does the conduct complained of constitute something actionable under the statute, such as discrimination, harassment, or retaliation. The district court correctly instructed the jury that employers can be liable for co-worker actions when they know about and fail to correct the offensive conduct.

Id., at 1334. *In accord, Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir. 1998): "retaliation can take the form of a hostile work environment." *Also see, Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000) which cited *Drake* and stated:

> We agree with our sister circuits. Harassment is obviously actionable when based on race and gender Harassment as retaliation for engaging in protected activity should be no different – it is the paradigm of "adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.

The approach taken by the Sixth and Seventh Circuits is supported by the Equal Employment Opportunity Commission (EEOC) as noted in *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 6/18/99:

> The Commission has always taken the position that the same basic standards apply to all types of prohibited harassment. Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment .
> The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes.
>
> The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect - - an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.

Id., Introduction Section

Complainant participated in a protected activity by filing his first complaint with the Commission (Case No. 98-0110-PC-ER). Dr. Soofi knew the first complaint was filed and such knowledge played a part in the June 15th incident, as evidenced by the following statement made by Dr. Soofi during the incident: "You filed complaints, I will see you in court, you fucking coward." (See ¶16, Findings of Fact.)

The Commission now turns to the question of whether the June 15th incident constitutes actionable harassment. Many factors are pertinent to this inquiry, as explained in the context of a sexual harassment claim in *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806-806 (2000):

> [S]exual harassment is actionable under Title VII only when it is sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank*, 477 U.S. at 67, 106 S. Ct. at 2405, quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). Whether the harassment rises to this level turns on a constellation of factors that include "the frequency of the discriminatory conduct; its severity;

> whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283, 141 L.Ed.2d 662 (1998). We also assess the impact of the harassment upon the plaintiff's work environment both objectively and subjectively. The work environment cannot be described as "hostile" for purposes of Title VII unless a reasonable person would find it offensive and the plaintiff actually perceived it as such. *Faragher*, 118 S. Ct. at 2283, citing *Harris*, 510 U.W at 21-22, 114 S. Ct. 370-71

The incident of June 15, 1998, resulted in no tangible employment action, "like hiring, firing, promotion, compensation, and work assignment," *Faragher v. City of Boca Raton*, 524 U.S. 775, 77 FEP Cases 14, 19 (1998). The question, accordingly, is whether the single incident was sufficiently severe or pervasive to create a hostile work environment.

Complainant contends that the one incident is sufficient to support a hostile environment claim because the circumstances constituted "the tort of assault," to which the following jury instructions (Wis. JI-Civil 2004 Assault) pertain (post-hearing brief dated 11/22/00, pp. 13-14):

> An assault is an unlawful attempt, coupled with apparent present ability, either to do physical harm to another or to put another in fear that physical harm will be done to that person. An assault is committed, therefore, if a person is put in fear of an immediate and harmful bodily contact, regardless of whether the actor intends to injure such person or whether the actor simply intends to put such person in fear that physical harm will be done to (him) (her).
>
> Before you may find that (defendant) committed an assault, you must be satisfied to a reasonable certainty by the evidence which is clear, satisfactory, and convincing that the following elements of an assault existed: first, that (defendant) made menacing physical movements at and toward (plaintiff) which were performed close enough to (plaintiff) to justify in (him) (her) a reasonable fear of physical harm; second, that under all of the circumstances then and there existing, (plaintiff) had reasonable cause to believe, and did believe, that (defendant) had a present ability to cause physical harm to (him) (her) and did intend to cause (plaintiff) physical harm; third, that at the time (defendant) either had an intent to cause physical harm to (plaintiff) or an intent to put (plaintiff) in fear that physical harm was to be committed upon (him) (her).

Complainant's purpose for citing the jury instruction is noted below (post-hearing brief dated 11/22/00, p. 15):

> Complainant certainly recognizes that the Personnel Commission is not the forum in which to prosecute a claim for the tort of assault. The purpose of this discussion is to underscore how severe Soofi's conduct was on June 15, 1998 and to establish that Soofi's conduct did indeed constitute an adverse employment action.

Conduct constituting a tort claim for assault and battery is not synonymous with an actionable harassment claim but is a factor to consider. *See*, *Burnett v. Tyco Corp.*, 203 F.3d 980, 985 (6th Cir. 2000), where the potential battery involved a man reaching under a woman's shirt to place a pack of cigarettes under her bra strap. The court reasoned (*Id.* at 984-985):

> [T]he cigarette pack incident . . . is fairly severe and perhaps even constitutes a battery. However, under the totality of the circumstances, a single battery, coupled with two merely offensive remarks over a 6-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment.

Respondent contends that the June 15th incident is insufficient to support a hostile environment claim, arguing as noted below in pertinent part (post-hearing brief dated 12/22/00, p. 17):

> There is no reason to doubt that Complainant was genuinely shaken by whatever occurred on June 15, 1998. However, Complainant also testified that Dr Soofi never physically touched him and that after the incident he walked, rather than ran, out of the building. Moreover, the event had very little tangible effect on his work. Complainant testified that he felt uncomfortable at an extra-curricular meeting of the Western Economic Association soon after the encounter. He also testified that he felt "hindered" in carrying out his duties as interim department chair that summer, but he did not say how, beyond having some "uneasiness" about going back to his office, which had the effect of requiring him to go to a local supermarket on one occasion to xerox some papers rather than using the Department machine. He further testified that he was generally able to avoid Dr. Soofi following the incident and that there was no interference with his teaching, which was certainly facilitated by Dr Soofi's move to UW-Milwaukee the following semester. These facts are not enough to raise an inference that

> Complainant's terms and conditions of employment changed in any meaningful way as a result of the June 15, 1998 encounter.

The Commission recognizes that the June 15th incident did not have a significant impact on complainant's work performance (see ¶17, Findings of Fact). The degree of impact on work performance, however, is only one of a constellation of factors considered. The Supreme Court has held that "no single factor is required." *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993).

It is clear that a claim of harassment does not require repeated incidents. One incident was found sufficient to support a claim under Title VII of the Civil Rights Act of 1964, *42 U.S.C. §200e et seq.*, wherein the court described the incident as follows:

> On August 30, 1992, during their regular shifts at the Cook County Jail, Gamble entered Smith's work station to collect inmate commissary slips. A dispute ensued, during which Gamble called Smith a "bitch," threatened to "fuck [her] up," pinned her against a wall, and twisted her wrist severely enough to damage her ligaments, draw blood, and eventually required surgical correction.

Smith v. Sheahan et al., 189 F.3d 529, 531 (7th Cir 1999) Prior to filing the Title VII claim, Mr. Gamble was convicted on a criminal battery charge related to the above-described incident and later, of the lesser state law tort claim for assault and battery. *Id.* at 532

The Commission also recognizes that the June 15th incident involved no physical component. However, physical touching is not required if the incident is sufficiently severe. In *Longstreet v. Ill. Dept. of Corrections*, 1999 U.S. Dist. LEXIS 16205, 99-C-2490 (E.D. Ill. 2000), a male correctional officer became enraged when a female coworker (Longstreet) did not respond in kind to his sexual comments. He blocked the stairway, preventing Longstreet from leaving until he masturbated in front of her and forced her to get him water and paper towels so he could clean himself. One month later, another male officer rubbed his crotch against Longstreet's rear end. The court considered that the first incident (which involved no physical contact) was sufficient to support that Ms. Longstreet's harassment claim. The Court's reasoning is quoted below:

> Defendants' only argument for dismissing the sexual harassment claim is that Longstreet alleges merely two incidents and that therefore, she has not alleged "severe or pervasive" harassment. But, I find it reasonable to infer that by confining Longstreet in the tower, masturbating in front of her and then forcing her to assist his clean-up, Bester severely harassed his victim. This incident was both physically threatening and humiliating, far beyond the "ordinary tribulations of the workplace" that Title VII does not forbid.

Id. at 5-6.

The June 15th incident was far beyond the ordinary tribulations of the workplace. The complainant's subjective view was that he felt threatened for his physical safety. Respondent concedes that there "is no reason to doubt that Complainant was genuinely shaken by whatever occurred on June 15, 1998" (post-hearing brief dated 12/22/00, p. 17). Dr Soofi's history of aggressive behavior (noted in ¶7, Findings of Fact) enforced complainant's subjective view. The Commission believes that a reasonable person with an objective view of incident on June 15th and knowledge of Dr Soofi's past also would have feared for his/her physical well being. Accordingly, even though the subject incident is not as egregious as those cited in *Smith* or *Longstreet*, *supra*, the facts are sufficient under a probable cause standard to support a hostile environment claim.

The Commission now turns to the question of respondent's liability. In a case of harassment by a co-worker, an employer "will not be held liable for the hostile environment absent proof that it failed to take appropriate remedial measures once apprised of the harassment." *Hostetler,* 218 F.3d 798, 809. Respondent was apprised of the incident because complainant reported it to Vice Chancellor Curtis, as noted in ¶18, Findings of Fact. Respondent contends that no liability attaches because it took remedial action by moving Dr Soofi to the Milwaukee campus. The Commission disagrees.

Dr Soofi's transfer to Milwaukee was temporary with an expected return to the Platteville job in the fall semester of 2000. Even while working in Milwaukee, Dr Soofi used his office in Platteville at least on a weekly basis. (See, ¶19, FOF.) In short, the potential continued that Dr. Soofi and complainant would be in close proximity at the workplace. Yet, respondent has never told Dr. Soofi that his actions on June 15th were inappropriate in any way. In fact, respondent led him to believe the transfer was a positive thing. Under these circum-

stances, respondent cannot seriously claim that the transfer was designed to curb further retaliation. *See, Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1275 (7th Cir 1991) where the employer was held liable because it failed to warn employees that racial harassment would not be tolerated in the workplace.

ORDER

Case Number 98-0110-PC-ER is dismissed on the merits. Complainant has established probable cause with respect to Case No. 98-0129-PC-ER and may now proceed to a hearing on the merits of this claim.

Dated: July 10, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95