STATE OF WISCONSIN PERSONNEL COMMISSION

KAY L. JAVENKOSKI,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 99-0101, 00-0010, 00-0013-PC-ER

RULING ON MOTIONS TO DISMISS

These are complaints alleging sexual harassment and violation of the Family and Medical Leave Act (FMLA). Respondent has filed a motion to dismiss all three complaints as moot, and a motion to dismiss Case No. 00-0013-PC-ER for untimely filing. The parties were permitted to brief these motions and the schedule for doing so was completed on July 10, 2000. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. Case No. 99-0101-PC-ER was filed June 14, 1999, and alleges sexual harassment of complainant by co-worker RR.

2. Case No. 00-0010-PC-ER was filed on January 20, 2000, and alleges sexual harassment of complainant by co-worker RR.

3. Case No. 00-0013-PC-ER was filed on January 20, 2000, and alleges a violation of the FMLA in regard to a memo complainant received from Supervisor David Coady on July 1, 1999, and in regard to a memo prepared by co-worker RR relating to team attendance which complainant received no later than October 21, 1999.

4. Complainant resigned her position with respondent effective May 25, 2000. In the written arguments she filed on June 21, 2000, complainant indicated as follows, in relevant part:

> Although it is correct that I resigned I would not agree that it was totally voluntary since the options given me to continue employment were either to relocate to Elkhorn which is over 200 miles from my home or be terminated. Because the Elkhorn reassignment was unreasonable and rather than have a termination on my employment record I feel I was forced to choose resignation and this is part of the complaint itself.

5. Co-worker RR transferred out of the office where complainant was employed effective December 3, 1999.

6. At all times relevant to this matter, complainant was employed in the Department of Transportation Office Building in Rhinelander. This building houses the District 7 offices as well as the Division of Motor Vehicles (DMV) Customer Service Center. Prior to September 13, 1999, complainant was employed by the DMV; and, as of September 13, 1999, by District 7 on a temporary work assignment.

7. At all times relevant to this matter, respondent has posted in plain view on a bulletin board where notices to employees are customarily posted in the Department of Transportation Office Building in Rhinelander a copy of an approved notice setting forth employee rights under the FMLA. This bulletin board was located in the common break room for building employees which is in close proximity to the restrooms used by all building employees. Complainant was present in this common break room at least several days a week during her employment in the building.

8. During the relevant time period, there was a break room for DMV employees in another part of the building. The bulletin boards in this break room did not display any notice relating to the FMLA.

9. Complainant, in the brief she filed on March 23, 2000, relating to the timeliness motion, stated as follows, in relevant part:

> Since my temporary assignment to Transportation on September 13, 1999, I of course used their facilities on a regular basis but did not have

an occasion to read or be drawn to their bulletin board for information regarding FMLA.

OPINION

Mootness

In *Burns v. UW [UWHCA]*, 96-0038-PC-ER, 4/8/98, the Commission discussed the concept of mootness as follows:

> An issue is moot when a determination is sought which can have no practical effect on a controversy. *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688, 689 (Ct. App., 1985). The focus, generally, is upon the available relief in relation to the individual complainant (*see, e.g., Lankford v. City of Hobart*, 36 FEP Cases 1149,1152 (10th Cir., 1996) and *Martin v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994)) but may shift to a consideration of others in the workplace when an overt policy of discrimination is alleged to impact on a category of employes (*see, e.g., Kennedy v. D.C.*, 65 FEP Cases 1615, 1617 (D.C. Cir., 1994), involving review of a grooming code.)
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> In *Watkins v. DILHR,* 69 Wis. 2d 782, 12 FEP Cases 816 (1975), it had been concluded that the complainant had been discriminated against by her state agency employer on the basis of her race when she was denied a requested transfer to a different position in 1969 and in 1970. The Wisconsin Supreme Court ruled that the controversy was not moot even though the complainant had been transferred to the position she sought in 1971 (which was after she had filed her complaint of discrimination). The basis for the Court's ruling was that, since the complainant remained an employee of DILHR, an order could be entered which would have the practical, legal effect of requiring that the complainant be considered for all future transfers on the basis of her qualifications and ability, and without regard to her race; that the complainant was entitled, having suffered frustration in her employment over an extended period of time, to know whether or not this was due to race discrimination; and that it would foster, not eliminate, discrimination if employers in such situations could escape liability by simply waiting until enforcement proceedings were begun and then remedying the subject adverse action.

In *Ferguson v. DOCom*, 98-0099-PC-ER, 3/22/00, the Commission, in concluding that a claim was moot since the complainant was no longer employed by respondent, emphasized that an important consideration in reaching this conclusion was the fact that complainant had not challenged her separation from employment and there was no basis for the Commission to conclude that complainant intended to mount such a challenge.

Here, complainant has challenged her separation from employment in Case No. 00-0065-PC-ER. In that case, complainant claimed that respondent's failure to reinstate her to her previous position after an FMLA leave, and to instead offer her a position in Elkhorn, violated the FMLA. It is this identical situation which forms the basis for complainant's contention that her resignation was coerced. (See Finding 4., above). However, Case No. 00-0065-PC-ER was dismissed by the Commission on August 23, 2000. On this basis, the Commission concludes that not only is complainant not currently employed by respondent but there is no basis, such as an unresolved action challenging her resignation, upon which to conclude that she is likely to be in the future. Since the potential remedy in these cases would consist of a cease and desist order which would only have a practical effect if complainant were employed by respondent, these controversies are moot.

Timeliness—Case No. 00-0013-PC-ER

Section 103.10(12)(b), Stats., sets forth the following requirement for filing an action pursuant to the FMLA.

> An employee who believes his or her employer has violated sub.(11)(a) or (b) may, within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint with the department alleging the violation.

Section 103.10(14)(a), Stats., provides as follows, in relevant part:

> Each employer shall post, in one or more conspicuous places where notices to employes are customarily posted, a notice in a form approved by the department setting forth employes' rights under this section.

Section Ind. 86.05, Wis. Adm. Code, tolls the 30-day filing period set forth in §103.10(12)(b), Stats., "until either the first date that the employer comes into compliance with section 103-10(14)(a), Stats, by posting the required notice, or the first date that the employee obtains actual notice of the information contained in the required notice, whichever date occurs earlier."

In *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; rev'd on other grounds, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W 2d 200 (Ct App. 1994), the Commission ruled that displaying an FMLA notice on a bulletin board used for posting employee notices in an area where the Bureau's top administrative offices, one of only two copy machines, and only FAX machine were located; and not on other bulletin boards in the Bureau where employee notices were posted, complied with the posting requirements of §103.10(14), Stats.

In interpreting the FMLA posting requirement, the court in *In-Sink-Erator v. DILHR*, 200 Wis. 2d 770 (1996), stated as follows, in pertinent part:

> .it is apparent that the statute requires readily visible notice in a place where the employee could reasonably expect the notice to be placed. It requires the notice to at least be in a place where the employee would be familiar with it through long use or acquaintance.

In *In-Sink-Erator*, many plant employees rarely, if ever, spent time in the lobby area where government notices, including the FMLA notice, were posted, and had little or no opportunity, as a result, to view these notices.

The fact situation under consideration here, in which all employees of the building, including complainant, routinely spent time in the common break room where the FMLA notice and others were readily visible on a bulletin board on which employee notices were routinely posted, is more comparable to that in *Sieger* than to that in *In-sink-Erator, supra*. This was especially true for complainant after September 13, 1999, when she began a temporary assignment for District 7 and apparently took her breaks in this common break room rather than in the DMV break room. The fact that complainant may not have chosen to read the notices posted on the common break room bulletin board (See Finding 9, above) is not respondent's failing, but

complainant's, and does not demonstrate that the FMLA notice was not conspicuously displayed in an area where employee notices are customarily posted. In *Sieger, supra*, the Commission held that "[i]t would be nonsensical to hold that an employer's posting of a notice was invalidated due to its employees' failure to read it." It is concluded that respondent's posting of the FMLA notice satisfied the requirements of §103.10(14)(a), Stats., vis a vis complainant's employment by respondent in the Rhinelander building at least as of September 13, 1999. As a result, the time period for complainant to file an FMLA claim would not be tolled beyond September 13, 1999, for an adverse action which occurred prior to that date.

According to complainant, she became aware of the actions which form the basis for Case No. 00-0013-PC-ER on July 1 and October 21, 1999. Since complainant filed this case on January 20, 2000, the 30-day actionable period here would be December 21, 1999, through January 20, 2000. Since the July 1 date would not be tolled past September 13, 1999, and since neither September 13 nor October 21, 1999, fall within the actionable period, it is concluded that complainant failed to file this FMLA action within the 30-day time period specified in §103.10(12)(b), Stats., and respondent's motion to dismiss should be granted.

Complainant also appears to be arguing in this regard that her failure to file this FMLA complaint within the statutory 30-day time period resulted from the fact that she did not become aware of the FMLA or its filing requirements until some time in December of 1999 or January of 2000. However, the Commission has been consistent in holding that lack of familiarity with the law does not toll a statutory filing period. *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98.

CONCLUSIONS OF LAW

1. These matters are appropriately before the Commission pursuant to §§230.45(1)(b) and (k), Stats.

2. Based on this record, these matters are moot.

3. Complainant has the burden to show that Case No. 00-0013-PC-ER was timely filed.

4. Complainant has failed to sustain this burden.

ORDER

Respondent's motion to dismiss Case Nos. 99-0101, 00-0010, and 00-0013-PC-ER as moot is granted, and respondent's motion to dismiss Case No. 00-0013-PC-ER as untimely filed is granted. These cases are dismissed.

Dated: August 28, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:990101C+rul1

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