

6. Shortly afterwards, Dahlberg took the BMH 3 examination and was ranked number one. Later, she was interviewed and in August 1986 appointed to one of three newly created positions at the UWRF Physical Plant.

7. Howard Robey, the immediate supervisor for these positions, who conducted the interviews, had no knowledge of Dahlberg's letter when he interviewed her. After the interviews he recommended Dahlberg for one of the BMH 3 positions.

8. At the time Dahlberg was selected for the position in August 1986, she was on medical leave beginning on November 8, 1985.

9. Dahlberg continued on medical leave until February 1, 1987, when she began her appointment as a BMH 3.

10. Shortly after beginning her BMH 3 employment, while being shown the work site by a BMH 2, the BMH 2 commented to Dahlberg that her jeans were too tight and told her that rumors were being spread about her sexual behavior.

11. The BMH 2 also told Dahlberg the source was Housekeeping Supervisor Manville Kenney when he told him and other BMH 2's to ignore and stop spreading rumors about Dahlberg's sexual behavior.

12. On another occasion, other BMH 2 subordinates made comments to Dahlberg about rumors of her sexual behavior.

13. On February 9, 1987, Dahlberg reported her subordinate BMH 2s' comments about her sexual behavior to Manville Kenney, her second-line supervisor.

14. Kenney advised Dahlberg to ignore the comments -- that the BMH 2's were not used to being supervised by a woman and that these comments would wane given time.

15. After Dahlberg's complaint to Kenney about her subordinate BMH 2's, Kenney again talked to several BMH 2's he thought might be involved in spreading the rumors. He told them -- Glen Lambert, Al Larsen, Blaine Mortimer, and Norm Nelson -- that spreading these rumors about Dahlberg was not acceptable behavior and that they should not participate in spreading such rumors.

16. As Dahlberg continued her employment in 1987, rumors began about her and Nathan Beeman, another BMH 3 who also was appointed in August 1987.

17. Beeman and Dahlberg approached Kenney about rumors that they were sexually active together. Since neither Dahlberg or Beeman knew

the source of the rumors, Robey, their immediate supervisor, instructed Beeman and the other BMH 3, who was male, not to work with Dahlberg without first getting permission from him. Robey never denied such permission.

18. The rumors about Dahlberg and Beeman persisted until Dahlberg went on medical leave, four months later, on June 1, 1987.

19. Beeman was as much the focus of these rumors as Dahlberg. On one occasion, Beeman and complainant found nude photographs in his desk drawers; on another occasion, figurines together in a sexual position on top of their desk; and later, liquid soap in both his and Dahlberg's desk, which was across the room from Beeman's. [These changes are made to conform the findings to the opinion: see p. 7.]

20. Following the soap incident, the office was rekeyed with the issuance of keys to only the three BMH 3 lead workers and their supervisors.

21. From June 1, 1987 to May 2, 1988, while Dahlberg was on leave, the rumors abated.

22. When Dahlberg returned to work in May 1988, the sexual rumors about her and Beeman resumed.

23. Following being told of rumors that they had engaged in sexual activity while setting up furnishings for commencement, Dahlberg and Beeman discussed the matter with John Spielman, the Director of Personnel.

24. After Spielman discussed the Dahlberg and Beeman complaints with Kenney,¹ investigations ensued and predisciplinary meetings were conducted in July 1988 with three BMH 2's believed to be involved in spreading the rumors about Dahlberg and Beeman.

25. The predisciplinary meetings as they pertained to sexual harassment and vandalism were inconclusive, no disciplinary action was taken regarding these matters, and on July 12 Kenney issued a memorandum to the custodial staff in the Physical Plant warning them against violating work rules and sexual harassment policies. The memorandum referenced two incidents of vandalism directed toward lead workers.

26. Kenney also met with all the custodians, advised them that remarks and actions that could be defined as sexual harassment were against

¹ Spielman's discussion with Dahlberg and Beeman occurred while Kenney was on vacation. Spielman talked with Kenney immediately upon Kenney's return.

work rules and UWRF policies, would not be tolerated and warned them that such activity would result in disciplinary action.

27. Later in July, Dahlberg was evaluated for her six-month probationary period -- interrupted by her medical leave -- ending July 31, 1988.

28. On July 29, 1988, Dahlberg was recommended for permanent status as a BMH 3.

29. The following Monday, August 1, 1988, Dahlberg called in to her supervisor that she was ill.

30. Later in August, the Personnel Director, Spielman, sent Dahlberg forms to grant sick leave.

31. On August 26, 1988, the Office of Personnel UWRF received income continuation forms from Dahlberg, absent a physician's statement, regarding Dahlberg's illness and prognosis.

32. In a note dated August 31, 1988, Dahlberg's doctor advised the UWRF personnel office that: "(Dahlberg) is off job because of her back problem and back pain."

33. On September 9, 1988, Dahlberg was granted a leave of absence from August 1, 1988 to February 1, 1989, but Spielman wrote Dahlberg's doctor requesting additional information: diagnosis, return to work prognosis, possible return date, upon return would patient be able to resume duties of her position, how many hours per day could patient work, and work restrictions, if any.

34. In response to Spielman's request, Dahlberg's doctor did not provide the requested information, but suggested that Spielman contact the income continuation insurance carrier for its plan regarding Dahlberg's inability to work.

35. On September 22, 1988, Spielman wrote Dahlberg scheduling a meeting to discuss and present medical information regarding her leave of absence.

36. Later Spielman talked with Dahlberg's attorney and cancelled the meeting after getting assurance from him of full cooperation in providing the requested medical information. Spielman wrote the attorney for the information.

37. The requested information was not provided as promised by Dahlberg's attorney, Dahlberg or her physician.

38. On October 25, 1988, Dahlberg filed charges of sex and handicap discrimination and retaliation against UWRF in violation of the Wisconsin Fair Employment Act with the Commission. This complaint was designated as Case No. 88-0166-PC-ER.

39. On January 20, 1989, Spielman wrote Dahlberg reminding her that her leave was scheduled to end on January 31, 1989, and that she was expected to return to work on February 1, 1989. Also, she was advised that her failure to report to work might result in disciplinary action up to and including discharge.

40. Shortly afterwards, Dahlberg responded to Spielman's letter and requested a six-month extension of her leave. She did not return to work on February 1, 1989.

41. By letter dated February 6, 1989, Spielman gave Dahlberg written notice of a predisciplinary hearing scheduled for February 14, 1989.

42. On February 13, 1989, Dahlberg sent Spielman a notation from her doctor stating that there was no change in her condition and that she could not return to work.

43. At a predisciplinary hearing held February 16, 1989, attended by Dahlberg, Spielman and others on both sides, decisions on Dahlberg's alleged work rule violations and leave request were held in abeyance pending further medical documentation from Dahlberg's doctor and a medical assessment by a doctor selected by the university.

44. On April 3, 1989, Spielman wrote Dahlberg advising her that she was placed on Administrative Leave Without Pay while in the process of making a decision on her request for a medical leave extension.

45. On May 1, 1989, Dahlberg filed another charge of sex and handicap discrimination and retaliation against UWRF, which was designated by the Commission as Case No. 89-0048-PC-ER.

46. Dahlberg has been off work since July 29, 1988.

CONCLUSIONS OF LAW

Case No. 88-0166-PC-ER

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to prove that she was discriminated against by respondent on the basis of her sex and retaliated against for fair employment activities in violation of §§111.31-111.37, Stats.

3. Complainant has failed to sustain this burden of proof.
4. Complainant has failed to prove respondent discriminated against her as alleged.

Case No. 89-0048-PC-ER

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to prove that she was discriminated against by respondent on the basis of her sex and retaliated against for fair employment activities in violation of §§111.31-111.37, Stats.
3. Complainant has failed to sustain this burden of proof.
4. Complainant has failed to prove respondent discriminated against her as alleged.

OPINION

Case No. 88-0166-PC-ER

The issues in this case are:

Whether respondent discriminated against complainant on the basis of sex in the terms and conditions of her employment during the period 1987-1988; and whether respondent discriminated against complainant on the basis of sex and/or in retaliation for engaging in activities protected under the Wisconsin Fair Employment Act in regard to her August, 1988, medical leave of absence.

In cases of discrimination under the Wisconsin Fair Employment Act (WFEA), the Commission has consistently used the analytic framework contained in McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981) adopting it to the particular circumstances of the case. Here the complainant alleges that she was sexually harassed by rumors and overt acts directed toward her creating a hostile work environment. To prevail, complainant must establish the elements set forth in §111.32(13), Stats.:

(13) "Sexual harassment" means unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes.

[This change is made to more accurately reflect Wisconsin law under the Fair Employment Act.]

Complainant is in a protected class under the WFEA and at least some of the harassment alleged was based on sex. The next factor is whether the alleged sexual harassment was pervasive and regular.

During complainant's first 4 months in her new position as a BMH 3 lead worker, complainant was only approached twice by subordinates in incidents which might be considered harassment. These two incidents occurred shortly after she started work in February 1987. Later, just before complainant went on medical leave in 1987, nude photographs and figurines were placed on her desk. Similar items were placed on the desk of her male peers. Otherwise, reports of rumors came to complainant through her peers or her friends. When complainant returned to work a year later in May 1988, the rumors resumed about complainant and Nathan Beeman, her peer BMH 3. Beeman testified that the rumors occurred about once a week and that they were reported to him by complainant or two of his subordinates. At commencement time a new round of rumors of sexual improprieties again linking complainant with Beeman occurred. Liquid soap was found in the desks of complainant and Beeman. Also during this period, complainant received anonymous phone calls telling her that they did not like BMH 3's and they were not going to work for a woman. Complainant was advised by Manville Kenney to report the calls to the police or the telephone company to obtain the identity of the caller. Complainant never called the police or telephone company about the phone calls. About July 17, 1988, when complainant reported to work, she discovered that her work cart had been removed from its usual place. After a search of 2 hours, it was found. At the end of July, complainant stopped working for UWRF. Later she obtained a medical leave.

The Commission believes that these circumstances, those which could be construed as being directed at complainant because of her sex,² are not severe and regular enough to establish sexual harassment. Only on two occasions did anyone directly make comments of a sexual nature to complainant. Most of the rumors about which complainant complains came to complainant from her

² Pranks were also played on Dahlberg's male peers. Many of the BMH 2's had competed for the three BMH 3 positions and were disgruntled over the reorganization and appointments. It is difficult to assign these acts to sex discrimination.

friends and peers. And complainant herself contributed by recounting the rumors to her friends and peers at work. Also there is no evidence that these occurrences of sexual harassment affected her work. During her discussions with her supervisors and John Spielman, complainant never told them that the work environment was becoming intolerable. To the contrary, complainant's supervisor thought her work was satisfactory and recommended that she pass probation. No, the record shows that the rumors, once told, began to lose their gloss until replaced by a new one.

Still, continuing with the analysis of factors constituting sexual harassment, the Commission believes that once respondent was informed by complainant that she was being harassed, respondent immediately took measures to resolve the problem. Complainant's immediate supervisor talked with several employees thought possibly to be involved, and instructed them not to spread rumors. Even prior to complainant's first day of work in February, Kenney and Robey, sensing discontentment among the staff because of the recent unit reorganization and appointments to the newly created BMH 3 positions, counseled the Housekeeping Services employees against spreading rumors and causing problems for the new appointees. Later when complainant returned to work in May 1988 and the rumors resumed, Kenney and John Spielman, the Director of Personnel, initiated an investigation, followed by predisciplinary meetings. Following the soap incident, Kenney had the office door lock changed and issued keys only to the three BMH 3's and their supervisors. And failing to determine the source of the rumors through the investigation and subsequent meetings, Kenney issued a memorandum warning all department employees against vandalism and sexual remarks directed toward the BMH 3's.

Clearly, the evidence substantiates the conclusion that respondent took complainant's allegations of sexual harassment seriously and promptly took actions it believed would resolve the problem. Complainant's testimony that Kenney told her that he did not want a woman for the job and that she should not go to others in management about her claim of harassment is not corroborated by the evidence in the record. Kenney shielded Robey from complainant's "unfair practices" memorandum to UWRF officials prior to her interview with Robey for a BMH 3 position. Kenney also accepted Robey's recommendation to hire complainant. Also, Kenney denied making these statements. Finally, the Commission believes Kenney was a more credible witness than complainant.

Regarding the issue of retaliation, complainant's argument is not persuasive and the record does not support that conclusion. Complainant argues that she was treated differently from the other occasions she had requested medical leave. Complainant argues that she was on leave from June 1987 to May 6, 1988, on the basis of a note from her doctor, but in August 1988, respondent wanted to fire her and requested more medical information.

The evidence in the record shows that July 29, 1988 was complainant's last day of work for UWRF. On August 1, 1988, complainant telephoned her supervisor and informed him that she was not coming to work because of back problems. A leave of absence form was sent to complainant. It was returned with a note from complainant's doctor, dated August 31, 1988, stating: "(Complainant) is off her job because of her back problem and back pain." On September 9, 1988, Kenney signed a medical leave authorization for complainant, retroactive from August 1, 1988 to February 1, 1989. However, during this same period, the UWRF personnel office attempted to obtain medical information in completion of the Physician's Statement section of complainant's Income Continuation Benefit Claim Form. In requesting the additional medical information, Spielman in a September 9, 1988, letter to complainant's doctor wrote: "The answer to these questions will allow the University to plan position assignments more accurately." In view of complainant's medical leave record from November 1985 to August 1988, and respondent's subsequent reconfiguration of lead worker assignments, the Commission believes that respondent's request for medical information was reasonable.

Case No. 89-0048-PC-ER

The issue in this case is: Whether respondent discriminated against complainant on the basis of sex and/or for engaging in activities protected under the Wisconsin Fair Employment Act in regard to her February 1989, medical leave of absence extension.

Again, employing the McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973) approach to analyzing discrimination cases, as previously established, complainant is female and has protective status under WFEA. In proving the factor of different treatment because of her sex and retaliation, complainant argues that she, unlike male employees, was required to submit additional medical information to support her request. Complainant also argues that respondent arbitrarily limited her leave to February 1, 1989.

In considering complainant's arguments, the record shows that beginning in September 1988, before complainant filed her first complaint, respondent attempted to obtain medical information regarding complainant's condition to determine when complainant might resume her BMH 3 duties as lead worker for a group of employees who were responsible for cleaning one of three areas of the campus. During this period complainant interposed her private attorney, her union attorney, and her doctor, and never provided the requested information prior to the end of her medical leave on February 1, 1989. No evidence was presented showing complainant was treated differently from others of similar circumstances. And while complainant may have been treated differently than on other occasions when she requested medical leave, she was in a higher level position with greater responsibilities as lead worker. This responsibility as lead worker presented respondent with a more difficult task to replace her function. The record shows that instead of giving complainant an open-ended medical leave as requested, respondent gave complainant a six-month leave in accordance with the union agreements, thus providing a definite future date for reassessment of complainant's medical status. The Commission does not believe this was arbitrary.

Also, complainant argues that respondent should have simply sent leave forms in response to her request in January 1989 for an extension of leave. However, the record shows that complainant never submitted fully completed forms to respondent for her prior leave and resisted all attempts by respondent to obtain such information.

Based on the record, there is nothing to infer that respondent retaliated against complainant for engaging in activities protected under WFEA. Respondent's actions during the period at issue seem appropriate under the circumstances.

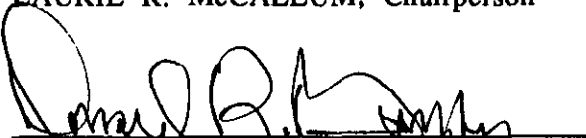
ORDER

In accordance with the Findings of Fact, Conclusions of Law, and Opinion set out above, the complaints in Case Nos. 88-0166-PC-ER and 89-0048-PC-ER are dismissed.

Dated: March 29, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


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 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.)