

- b) Did complainant's supervisor, Davis, fail to take action because of discrimination on the alleged March 1990 action of Eileen Ward's removal of work from complainant's desk?

Third, at hearing respondent objected to Ms. Iheukumere's testimony regarding events which occurred prior to February 14, 1990, which would be more than 300 days prior to the date the charge of discrimination was filed. Each of these objections is addressed in the DISCUSSION section of this decision.

FINDINGS OF FACT

1. Ms. Iheukumere began working for respondent in May 1982, when she was hired by Suzanne Metz as a word processing operator 1 (WPO1) in the Undergraduate Office of Admissions. Ms. Iheukumere found her co-workers (8-12 White clerical support staff) to be unfriendly and rude. She therefore accepted reassignment to another area in the office and this change occurred in or about June 1982.
2. Ms. Iheukumere found her new co-workers unfriendly too. In the fall of 1987, two of her co-workers were joking and one said to the other: "You Indian giver." Ms. Iheukumere was not involved in this verbal exchange. The comment was not made as a reference to Ms. Iheukumere who is part Indian, nor was it directed at her. She was offended by the racial connotation of the comment but said nothing that day.
3. The next day another co-worker, Eileen Ward, passed behind Ms. Iheukumere's desk and said to other staff: "Let's go to a chink restaurant". Ms. Iheukumere reported this comment and the one described in the prior paragraph to Jack Kellesvig, Associate Director. Mr. Kellesvig said he would take care of the situation. Ms. Iheukumere felt the office atmosphere did not improve. She provided two examples. First, she mentioned one incident where Suzanne Schultz told Ms. Iheukumere that Ms. Iheukumere should know what work to do, rather than ask others for work. The second example involved her exclusion from a meeting of telephone staff, which Ms. Iheukumere felt was inappropriate because she provided occasional back-up service to the telephone unit.
4. On October 1, 1987, Ms. Iheukumere decided her concerns were not being addressed so she asked for a meeting and filed a complaint with respondent's affirmative action (AA) office. (See A's. Exh. 82.) The AA office

conducted an investigation (R's Exh. 7). Ms. Iheukumere's filing with the AA office is an activity protected under the Fair Employment Act (FEA).

5. On October 9, 1987, while the investigation was pending, Ms. Iheukumere was filing documents apparently unseen behind file cabinets. Susan Schultz, Ms. Iheukumere's lead worker at the time, went to her own desk, held up a note and told other co-workers that the note was from a "spook". Ms. Iheukumere appeared in front of the file cabinets and everyone became quiet. The note was signed anonymously "spook", in reference to Halloween. Ms. Iheukumere mistakenly thought the comment was intended to reflect on her race (Black) because she had never heard the term used in reference to a ghost or Halloween. She informed David Vinson (Director) of the remark and her concerns. Ms. Iheukumere asked respondent to terminate Ms. Schultz.

6. David Vinson took action on these complaints and on October 12, 1987, issued a memo of concern to all staff (R's Exh. 2). The memo concerned reports of staff statements regarded as discriminatory and racist. Mr. Vinson stated in the memo that such comments, even if unintentional, reflect a lack of sensitivity and caring for the dignity of colleagues.

7. On October 26, 1987, Mr. Vinson sent Ms. Iheukumere a letter which outlined the results of his investigation and the corrective steps taken. (R's Exh. 3) As reflected in Mr. Vinson's letter, respondent took the following six actions in response to Ms. Iheukumere's concerns:

- i) October 12, 1987 memo to all staff emphasizing the seriousness with which respondent regards racist or discriminatory behavior.
- ii) Meetings between Mr. Kellesvig and each clerical support staff to discuss past comments, the October 12th memo, and future reporting expectations.
- iii) Vinson instructions to managers (Kellesvig and Crist) that any future incidents must be reported to Vinson and corrective action taken. (See R's Exh. 4.)
- iv) Ms. Schultz was not terminated, but was removed from lead worker responsibility over Ms. Iheukumere.
- v) Mr. Vinson encouraged Ms. Schultz to take advantage of the Employee Assistance Program.
- vi) Mr. Vinson, respondent's AA Office and the Division of Academic Services worked together to plan a professional presentation for staff regarding human relations and racial sensitivity.

8. Ms. Iheukumere wrote a response to Mr. Vinson stating her disagreement with his investigation (see R's Exh. 5). The only specific

suggestion she provided was for Ms. Schultz to be removed from any leadwork responsibility over "people of color". Mr. Vinson replied to her concerns by letter dated October 30, 1987 (see R's Exh. 6).

9. On November 16, 1987, the AA office (by Luis A. Pinero, Acting Associate Director) issued a report of its investigation, which basically reviewed the actions taken by Mr. Vinson. Mr. Pinero felt Mr. Vinson's actions were appropriate. He found no reason to believe that Mr. Vinson was retaliating against Ms. Iheukumere for the complaint she filed with the AA Office. The final paragraph of Mr. Pinero's report of November 16, 1987, stated as follows:

If you are dissatisfied with the outcome of this complaint investigation and wish to pursue the matter further, you have the right to file a formal complaint with the Wisconsin Personnel Commission or the Federal Equal Employment Opportunities Commission. Should you have any additional questions or concerns, we encourage you to contact our office. Thank you.

Ms. Iheukumere expected a more aggressive report, although she did not say so at the time. Nor did she file a complaint with the Commission at that time.

10. A specialist was hired from Washington D.C., to conduct the conference on racial sensitivity. Workshops were commenced too. Ms. Iheukumere felt the first workshop went well. A dispute between management and the union arose over union attendance for Ms. Iheukumere at the workshops. The dispute ultimately lead respondent to discontinue the workshops. Ms. Iheukumere felt the situation remained unresolved and that the meetings actually intensified her feeling of being targeted by co-workers.

11. Respondent gave Ms. Iheukumere an opportunity to transfer to another building with a new work unit in 1988, when part of the admissions office left for new quarters. Ms. Iheukumere declined this offer.

12. The workload was heavy in 1988 when Suzanne Metz, the unit supervisor, resigned. Ms. Iheukumere was the only word processor, except for Gretchen Care, whom Ms. Iheukumere was training. Gretchen, however, accepted another position. Her departure meant more work for Ms. Iheukumere.

13. A new unit supervisor, Christina F. Davis (hereafter, Supervisor Davis), was hired in December 1988. Alan Crist, Associate Director, told Ms.

Iheukumere about Supervisor Davis' hire and said Ms. Iheukumere should feel free to call him if problems arose. Ms. Iheukumere said Mr. Crist also stated that Supervisor Davis was aware of Ms. Iheukumere's "past problems" in the work unit. However, Supervisor Davis credibly testified that Mr. Crist did not tell her about the complaint filed with the AA Office, or about any discriminatory atmosphere in the workplace, and the Commission so finds. The first Ms. Davis learned of these matters was in February 1990. (See par. 24 below.) Ms. Davis is Native American.

14. Supervisor Davis asked Ms. Iheukumere to help train Karen Richolson. Complainant agreed to do so even though she already had a lot to do.

15. Despite Ms. Iheukumere's best efforts to keep up with the workload, she started to fall behind. Supervisor Davis first noticed problems with Ms. Iheukumere's backlog in or about February 1989, when co-workers complained to Supervisor Davis that they had to do Ms. Iheukumere's work because she was so far behind. Supervisor Davis then reviewed the situation for each person in the unit and established what appeared to her to be reasonable performance standards for all staff.

16. Eileen Ward was Ms. Iheukumere's lead worker from 1988 to 1990. Ms. Ward often would go to other worker's desks, remove unfinished work and complete it herself. Ms. Iheukumere was treated the same as any other worker in this regard. Ms. Ward may have taken more work from Ms. Iheukumere's desk but only because she had a backlog and greater corresponding need for help. What understandably irked Ms. Iheukumere was that Ms. Ward would not leave a note saying she took the work from Ms. Iheukumere's desk. This caused Ms. Iheukumere to then spend unproductive time trying to find out what happened to the missing work. It was not Ms. Ward's practice, however, to leave a note for any worker.

17. Ms. Iheukumere reported her problem with Ms. Ward to Supervisor Davis, who said she would take care of it. Supervisor Davis did speak to Ms. Ward asking her not to take work from Ms. Iheukumere's desk without leaving a note. As far as Supervisor Davis was aware, Ms. Ward complied with her request. Ms. Iheukumere acknowledged that the incidents of Ms. Ward taking work from Ms. Iheukumere without leaving a note decreased in frequency.

She alleged, however, that the incidents continued to occur occasionally. She did not inform Supervisor Davis of any further incidents.

18. Ms. Iheukumere did not feel Supervisor Davis treated her fairly. Ms. Davis, for example, approached Ms. Iheukumere and told Ms. Iheukumere she was not to receive any mail at the office. Ms. Iheukumere did not understand why she was signalled out for this restriction.

19. On occasion, Ms. Iheukumere made comments herself to which others took offense. For example, a co-worker was being harassed at work by a former roommate. Several employees felt threatened by the situation, so it was discussed at a staff meeting. Ms. Iheukumere asked if one of the roommates was gay. Another co-worker at the meeting slammed her hand down and said she was sick and tired of "these" comments. Ms. Iheukumere said she tried to explain she meant no offense. Supervisor Davis felt Ms. Iheukumere was being insistent with the inappropriate question and, therefore, told Ms. Iheukumere to either be quiet or leave the meeting. Ms. Iheukumere left the meeting and called Alan Crist to request a meeting. Mr. Crist told Ms. Iheukumere he was surprised Ms. Iheukumere made the statement. Ms. Iheukumere replied that she did not understand the offense taken because she would not be offended if someone had inquired about her own sex or race.

20. In September 1989, a second incident occurred when Ms. Iheukumere was at a meeting where staff were informed that respondent was in the process of hiring another support staff person. Ms. Iheukumere commented that she hoped men and women of color would be hired by respondent because "she was tired of looking at just white faces". Three coworkers (some black and some white) complained about the comment. Supervisor Davis spoke to Ms. Iheukumere about this.

21. On November 17, 1989, Supervisor Davis sent a memo to Ms. Iheukumere to schedule a meeting regarding placement of Ms. Iheukumere on a concentrated review program (CRP) (R's Exh. 8). The memo stated, in pertinent part, as follows:

I would like to meet with you sometime before 2:00 p.m. on Tuesday, November 21st to discuss your work performance. This meeting will be for the record and I know you will want your union representative to be present. Please speak with your union representative and see when they could come during those two days. Here is my schedule...

22. Various correspondence was exchanged between Ms. Iheukumere and Supervisor Davis regarding the meeting on the CRP. (See R's Exh. 9-12). On November 20, 1989, Supervisor Davis extended the meeting deadline to November 29, 1989, per Ms. Iheukumere's request for extension. (See R's. Exh. 13 -14). On November 28, 1989, Ms. Iheukumere called in sick. (See R's Exh. 15). On November 29, 1989, Supervisor Davis wrote Ms. Iheukumere a letter stating she was being placed on a concentrated review program because of performance problems. Follow-up meetings were scheduled and held on December 7 and 15, 1989. (See R's Exh. 16.) Further meetings were suspended until January 1990, due to Ms. Iheukumere's scheduled vacation. Supervisor Davis arranged for Ms. Iheukumere's co-workers to eliminate complainant's backlog during Ms. Iheukumere's vacation, leaving her with a "fresh start" when she returned to work.

23. At one of the December CRP meetings, Ms. Iheukumere said she felt her backlog existed because she had a greater share of the work than others. Supervisor Davis considered this possibility and investigated the division of work in the unit. Supervisor Davis found the work to be equally assigned and reported those findings to Ms. Iheukumere.

24. On February 15, 1990, Supervisor Davis sent Ms. Iheukumere a letter regarding sick leave abuse. Specifically, Supervisor Davis perceived a pattern of sick leave abuse by calling in ill on Mondays and Fridays. Supervisor Davis enclosed a copy of her recently-revised leave guidelines. (See R's Exh. 24). Ms. Iheukumere responded by memo dated February 15, 1990 (R's Exh. 25), noting in particular respondent's prior agreement to remove Ms. Iheukumere from any reporting responsibility to Ms. Schultz. Supervisor Davis consulted with Alan Crist to confirm the arrangement regarding Ms. Iheukumere and Ms. Schultz. This was the first time Supervisor Davis learned of Ms. Iheukumere's prior complaint about a discriminatory atmosphere. On March 5, 1990, Supervisor Davis altered the leave reporting guidelines so Ms. Iheukumere would not be required to report absences to Ms. Schultz. Rather, Ms. Iheukumere was to call Supervisor Davis and, if she were unavailable, to leave a message for her (R's Exh. 27).

25. Ms. Iheukumere was absent on Tuesday, March 6, 1990. Ms. Iheukumere failed to call Supervisor Davis directly to report the absence. On March 8, 1990,

Supervisor Davis sent Ms. Iheukumere a letter of reprimand for such failure. (R's Exh. 28). Ms. Iheukumere testified that she did call Supervisor Davis directly, but her attempt was thwarted due to respondent's telephone system. Ms. Iheukumere's testimony, however, was confused as to dates and the nature of the claimed telephone-system problems. Further, testimony from other witnesses did not support Ms. Iheukumere's contention that telephone-system problems existed in 1990. Rather, such problems existed previously in 1988 or 1989. The Commission finds complainant did not call Ms. Davis on her direct telephone line.

26. On March 7, 1990, Supervisor Davis wrote Ms. Iheukumere a letter which accelerated the meetings for the CRP. The meetings had been scheduled every other week, but were not taking place due to Ms. Iheukumere's absences. The switch to weekly meetings took effect on Monday, March 12, 1990 (R's Exh. 27). The meetings occurred as scheduled on March 12 and 19. (See R's Exhs. 34 & 35.)

27. On March 19, 1990, Ms. Iheukumere finished typing several documents in her computer word processor, but had not printed them out. She put a note on the corresponding work folders indicating the work was finished, but did not record the work as finished in the log book. (A's Exhs. 56 & 57.) She arrived at work the next day a little ahead of her normal starting time of 7:45 a.m. Ms. Iheukumere did not find the work on her desk, but found a note (A's Exh. 56) from Supervisor Davis that the work was given to a co-worker, Karen, to do. Ms. Iheukumere told Karen the work was done already. Supervisor Davis then went to Karen and Ms. Iheukumere and asked Ms. Iheukumere to show her that the work was done. Ms. Iheukumere asked for union representation, but Supervisor Davis denied the request as not required under the union contract. Supervisor Davis again asked Ms. Iheukumere to show her the completed work. Ms. Iheukumere again asked for union representation. Supervisor Davis placed Ms. Iheukumere on disciplinary suspension for one day. An irregularity existed in this process because respondent's practice was to impose a disciplinary suspension only after investigation. Here, the suspension occurred first, the matter was investigated and then the disciplinary letter was mailed. This departure from usual practice was due to Supervisor Davis' lack of knowledge about usual procedure. The departure

from usual practice was not motivated by any discriminatory reason of race, color or retaliation.

28. A weekly meeting for the CRP was scheduled for Monday, March 26, 1990. (See R's Exh. 37.) Ms. Iheukumere failed to appear at the meeting and failed to provide advanced notice that she would not appear. On March 28, 1990, Supervisor Davis wrote Ms. Iheukumere a letter stating that an investigatory meeting for such failure would be held on April 3, 1990. (See R's Exh. 40)

29. Also on March 28, 1990, Supervisor Davis sent Ms. Iheukumere a letter of investigation for possible reprimand regarding the events of March 20, 1990 (described in paragraph 27 above). The letter (R's Exh. 41) also indicated that Ms. Iheukumere lacked sufficient sick leave for her absences on March 21, 22 and 23, 1990; making it necessary to impose leave without pay for the hours not covered by sick leave.

30. Ms. Iheukumere continued to be absent from work. Supervisor Davis requested medical verification of her illness. On April 25, 1990, respondent placed Ms. Iheukumere on a four week leave of absence, effective April 27, 1990. Ms. Iheukumere was advised that she would be terminated if she failed to return to work on May 25, 1990, with a medical release. (See R's Exh. 48.) Extensions were granted on the leave of absence up to June 22, 1990, pursuant to Ms. Iheukumere's request. Ms. Iheukumere requested further extension by letter dated June 25, 1990. Citing "operational needs", the extension request was denied and Ms. Iheukumere was terminated, effective June 22, 1990 (R's Exh. 51).

31. Ms. Iheukumere was returned to work pursuant to a union grievance and arbitration award.

DISCUSSION

A. Preliminary Matters: Respondent's Objections.

A1) Timeliness of complaint about the concentrated review program.

Respondent contended that Ms. Iheukumere's complaint about the concentrated review program (CRP) was untimely. The charge of discrimination was filed on December 11, 1990, and, as a general rule, is timely as to acts occurring on or after February 14, 1990 (300 days prior to the filing

date). The decision to place Ms. Iheukumere on the CRP was made on or about November 17, 1989, which is more than 300 days prior to the filing date. Ms. Iheukumere remained on the CRP at least as late as March 26, 1990, as shown by the letter she received for failing to attend the scheduled CRP session.

It is arguable whether the CRP allegations are timely under a continuing violation theory of discrimination or retaliation. On one hand, the decision to place Ms. Iheukumere on CRP was a discrete event of which she received notice on November 17, 1989. Under this view, the CRP complaint is untimely. On the other hand, it could be argued that respondent needed to determine at the close of each review session whether Ms. Iheukumere would be continued on the CRP program. Under this view, the CRP complaint might be viewed as timely.

The Commission does not resolve this issue here because the Commission concludes that no discrimination or retaliation occurred regarding any of the CRP activities (as discussed more fully in section "C" below). The timeliness issue is unnecessary to resolve under these circumstances.

A2) Admissibility of Ms. Iheukumere's testimony regarding events which occurred prior to February 14, 1990. This section addresses events prior to February 14, 1990, except for the CRP events which were discussed previously. Testimony regarding non-CRP events which occurred prior to February 14, 1990, was allowed in the record to determine whether a continuing pattern and practice of discrimination existed. Considerable leeway was allowed by the examiner because Ms. Iheukumere presented her case without counsel.

The Commission has jurisdiction over events occurring prior to February 14, 1990, if they were part of a pattern and practice of discrimination. Isolated incidents where corrective action was taken by respondent are insufficient to support a finding that a pattern and practice of discrimination existed.

Ms. Iheukumere cites several incidents prior to February 14, 1990, of perceived unequal treatment and/or racial comments at work. Events up to 1988 (see FINDINGS OF FACT, pars. 1-9) were separate from the other alleged acts. As detailed in the FINDINGS OF FACT, respondent took appropriate action for each item brought to its attention. Furthermore, the analysis contained in

the remainder of this decision leads to the conclusion that discrimination and retaliation were not involved with the timely-filed allegations either.

Under these circumstances, Ms. Iheukumere has failed to show the existence of a pattern and practice of discrimination or retaliation. As a result, incidents prior to February 14, 1990, are irrelevant to Ms. Iheukumere's complaint; except events relating to the CRP which could be¹ admissible under a continuing violation theory, as discussed previously.

A3) Wording of proposed issue "b". The proposed issue as framed at the prehearing conference of June 7, 1993, focused the hearing issue on whether Eileen Ward's actions of removing work from Ms. Iheukumere's desk were discriminatory. A legal analysis of that issue would include a look at any corrective action which may have been taken by respondent. The respondent's alternative wording may be more artful, but really is not contrary to the conference-report statement. Therefore, the issue will remain as stated in the conference report.

B. General Legal Analysis at the Probable Cause Stage.

This is a probable cause decision. In order to make a finding of probable cause, there must exist facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed. PC 1.02(16), Wis. Admin. Code. In a probable cause hearing, the complainant has the burden of proof but at an evidentiary standard which is less rigorous than required at a hearing on the merits.

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. 729, 93 S. Ct. 1817 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981).

B1) A Prima-Facie Case of Race/Color Discrimination exists if complainant shows that she is a member of a group protected under the FEA

¹ The verb tense was changed to better-reflect the intended meaning.

and that she suffered an adverse employment action under circumstances which give rise to an inference of discrimination.

B2) A Prima-Facie Case of FEA Retaliation exists if complainant shows that she engaged in an activity protected under the FEA, she suffered an adverse employment action, the alleged retaliator was aware of complainant's participation in the FEA protected activity and a causal line exists between the protected participation and the adverse action.

B3) A Constructive Discharge Claim exists if complainant shows the employer knowingly permitted conditions of discrimination or retaliation to exist to such an extent that a reasonable person would feel compelled to resign. See Brooms v. Regal Tube Co., 881 F.2d 412, 50 FEP 1499 (7th Cir. 1989) (proper test focuses on impact upon reasonable person).

C. Concentrated Review Program

C1. Race/Color Claim. Ms. Iheukumere alleged respondent discriminated against her because of her race/color (Black and Native American). Ms. Iheukumere arguably established a prima facie case of discrimination: she is a member of two groups protected under the FEA (black and Native American), she was placed on the CRP and such action occurred despite her best efforts.

Respondent articulated a legitimate non-discriminatory reason for placing Ms. Iheukumere on a CRP. Co-workers complained to Supervisor Davis that Ms. Iheukumere was behind and they had to help do her work. Ms. Davis looked at work performed by the entire unit. She verified that Ms. Iheukumere's work was backlogged and she established performance standards for all staff, not for Ms. Iheukumere only. Furthermore, Ms. Davis investigated (and rejected) Ms. Iheukumere's claim that her work was backlogged because she had a greater share of work than others.

Ms. Iheukumere did not show pretext in respondent's legitimate reason for placing her on CRP. For example, she did not allege that other workers had similar backlog problems but were not placed on CRP.

C2) Retaliation Claim. Ms. Iheukumere alleged respondent retaliated against her in relation to the CRP. She established the first and second elements of her prima facie case. Specifically, the complaint she filed with respondent's AA Office in 1987, is an activity protected under the FEA, and she

was placed on a CRP starting in November of 1989. She failed, however, to establish the third and fourth elements. Specifically, Supervisor Davis was unaware of Ms. Iheukumere's participation in the protected activity until sometime in February of 1990, which was several months after the decision already had been made to place Ms. Iheukumere on the program.

C3) Summary. Under these circumstances, Ms. Iheukumere failed to establish facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination or retaliation probably has been, or is being committed in regard to the concentrated review program.

D. Removal of Work from Complainant's Desk.

D1) Race/Color Claim. Ms. Iheukumere alleged discrimination on the basis of race/color in relation to Ms. Eileen Ward removing work from her desk. Even at the lower probable-cause burden of proof, Ms. Iheukumere has failed to establish a prima facie case. Specifically, the examiner is unpersuaded that an adverse employment action was taken or that an inference of discrimination exists.

The examiner has no doubt that Ms. Ward's actions resulted in aggravation and at least some degree of lost production time for Ms. Iheukumere because of the need for her to determine where the missing work went. On the other hand, the missing work was done by someone else leaving less work in Ms. Iheukumere's backlog. In short, Ms. Iheukumere most likely came out ahead in terms of the size of her backlog. This result is difficult to characterize as an adverse employment action.

An inference of discrimination does not exist here. Ms. Ward followed the same practice with all subordinates regardless of race/color. Also, Supervisor Davis took corrective action promptly once Ms. Iheukumere shared her concerns. Ms. Ward's practices may have continued sporadically, but Ms. Iheukumere did not tell Ms. Ward. Respondent cannot be held liable for a situation respondent corrected and reasonably believed did not re-occur.

D2) Retaliation Claim. Ms. Iheukumere alleged retaliation in relation to Ms. Ward's removal of work from her desk. Ms. Iheukumere failed to establish a causal connection between her protected activities and the alleged adverse employment action basically for the same reasons as discussed in the prior paragraph. Furthermore, Ms. Davis was not aware of Ms. Iheukumere's

participation in a protected activity until February 1990, which was after the date Ms. Iheukumere complained to Ms. Davis about Ms. Ward, and after the date Ms. Ward took corrective action.

D3) Summary. In summary, Ms. Iheukumere failed to show facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination or retaliation probably has been, or is being committed in relation to removal of work from her desk by Ms. Ward.

E. March 8, 1990, Written Reprimand.

E1) Race/Color Claim. Ms. Iheukumere alleged discrimination based on **race/color** in relation to the March 8, 1990, written reprimand. She established the first two elements of a prima facie case. She is a member of two groups protected under the FEA and the written reprimand was an adverse employment action. Arguably she established the third element of a prima facie case because she was willing to provide the requested proof that the work was done if a union representative were present (a condition rejected by Supervisor Davis).

Respondent articulated legitimate, non-discriminatory reasons for its actions. Supervisor Davis' request for Ms. Iheukumere to show the completed work was reasonable because the work was not noted as completed in the unit's log book. Further, Supervisor Davis' refusal of union representation for Ms. Iheukumere was not shown to be contrary to contract rights. Ms. Iheukumere failed to show that the articulated reasons were pretextual.

E2) Retaliation Claim. Ms. Iheukumere alleged the March 8, 1990 reprimand was given **in retaliation** for her protected activities. She established at least 3 elements of her prima facie case by showing her involvement in a protected activity in 1987, by establishing that the adverse employment action occurred, and by showing that Supervisor Davis became aware of the protected activity about one month prior to imposing the reprimand. However, her claim would fail even if a prima facie case were established. The respondent articulated a legitimate reason for imposing the discipline and, as discussed in the prior paragraph, Ms. Iheukumere failed to show that the reason was pretextual.

E3) Summary. Under these circumstances, Ms. Iheukumere has failed to show the existence of facts and circumstances strong enough in themselves

to warrant a prudent person in believing that discrimination or retaliation probably has been, or is being committed in relation to the written reprimand of March 8, 1990.

F. March 28, 1990 Letter:

F1) Race/Color Claim. Complainant alleged discrimination on the basis of race/color in regard to the letter of March 26, 1990. Ms. Iheukumere established the first and second elements of her prima facie case. She is a member of two groups protected under the FEA and the letter of March 28, 1990 could be considered as an adverse action. She failed to show the third element of her case. Specifically, she failed to show information which would raise an inference of discrimination.

Even if Ms. Iheukumere had established a prima facie case, she has not shown respondent's articulated legitimate reason as pretextual. Respondent would expect attendance at the March 26, 1990, meeting. Furthermore, respondent's announced intention to investigate to determine if discipline should be imposed was reasonable and, in fact, should have been anticipated by Ms. Iheukumere.

F2) Retaliation Claim. Ms. Iheukumere alleged retaliation in relation to the March 28, 1990, letter of potential discipline. She established three elements of a prima facie case by showing that she participated in a protected activity in 1987, that (arguably) an adverse employment action was taken and the alleged retaliator, Supervisor Davis, was aware of Ms. Iheukumere's protected participation at the time the adverse action was taken. Her claim fails, however, because she failed to show that respondent's articulated legitimate reasons were pretextual, as discussed in the prior paragraph.

F3) Summary. In conclusion, Ms. Iheukumere failed to show the existence of facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination or retaliation probably has been, or is being committed in relation to the letter of March 28, 1990.

G. Constructive Discharge.

G1) Race/Color And Retaliation Claims. Ms. Iheukumere alleged discrimination based on race/color or retaliation in relation to her discharge on June 22, 1990. She failed to establish this claim because she did not show the employer knowingly permitted conditions of discrimination or

retaliation to exist to the extent that a reasonable person would feel compelled to resign.

The main events occurring within 300 days of February 14, 1990, related to the CRP and the two letters in March 1990. The examiner does not doubt that these events were unpleasant and upsetting to Ms. Iheukumere. However, respondent's actions were not based on retaliation or discrimination.

I. Examiner's Impressions.

Ms. Iheukumere and Supervisor Davis both impressed the examiner as competent individuals. Supervisor Davis' responses to Ms. Iheukumere's backlog problems impressed the examiner as fair and reasonable. In fact, Supervisor Davis' approach was to look at the performance of all subordinates, not just Ms. Iheukumere's. Further, Ms. Davis considered and investigated Ms. Iheukumere's perception of a heavy workload as compared to co-workers.

Ms. Iheukumere gave the examiner the impression that she truly felt singled-out or picked on at work. Her belief of discriminatory or retaliatory motives appeared to be based in strong part on her perception that the backlog arose despite her best efforts. It is human nature to look for other causes when problems appear to be beyond our control. Causes other than her abilities may exist, such as personality conflicts or workload inequities. The examiner strongly concluded, however, that the alleged discrimination or retaliation did not occur.

CONCLUSIONS OF LAW

1. Complainant is eligible to file charges of discrimination based on race/color and FEA retaliation.
2. There is No Probable Cause to believe that respondent discriminated against complainant on the basis of race/color or FEA retaliation.

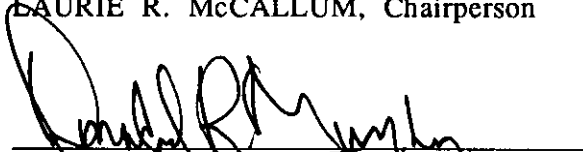
ORDER

Based on the foregoing, Ms. Iheukumere's complaint is dismissed.

Dated February 3, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


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.)