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LAURA RUTLAND,
 Complainant,

v.

President, UNIVERSITY OF
 WISCONSIN (Stout),
 Respondent.

Case No. 92-0221-PC-ER

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DECISION
 AND
 ORDER

Introduction

The Proposed Decision and Order was mailed to the parties on February 10, 1995. Each party filed written arguments with the Commission. The Commission considered the Proposed Decision and Order and the written arguments in regard thereto, and consulted with the examiner. The Commission modified the Proposed Decision and Order to better reflect its view and interpretation of the record and relevant legal authority.

Nature of the Case

On November 5, 1992, complainant filed a charge of discrimination (Complaint) with the Commission alleging respondent sexually harassed her, in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Wis. Stats. On January 15, 1993, she amended her Complaint and alleged that respondent had retaliated against her for activities protected by the whistleblower laws, s. 230.80, Stats., et seq. On February 24, 1993, complainant changed her claim of whistleblower retaliation to a claim of FEA retaliation.

On May 14, 1993, an Initial Determination (ID) was issued which found Probable Cause (PC) to believe sexual harassment occurred for which respondent was liable due to its failure to take appropriate action within a reasonable time. The ID also found No Probable Cause (NPC) to believe that FEA retaliation occurred. Ms. Rutland did not appeal the NPC portion of the ID. Accordingly, only the PC portion was considered at hearing.

The parties agreed to the following hearing issue at a prehearing conference held on September 30, 1993:

Whether respondent discriminated against complainant on the basis of sex (sexual harassment) as alleged.

A hearing was held in this case on February 8-9, 1994, and on March 21, 1994. The parties requested and were granted the opportunity to have a hearing transcript prepared. The first transcript was of poor quality, so the parties requested an opportunity to arrange for a different transcriber and such request was granted. The Commission received its copy of the transcript on June 10, 1994.

The parties requested and were granted the opportunity to submit briefs. Some extensions of time were requested and granted. The final brief was received by the Commission on 12/23/94.

Findings of Fact

1. During the 1990-91 academic year (AY), complainant was an undergraduate student at UW-Stout and worked in the Student Counseling Center (Center) as the student coordinator of the career development workshops. Pinckney Hall was her supervisor. Mr. Hall had been employed in the Center as both a counselor and a student practicum supervisor since 1969. David McNaughton was the director of the Center at this time. Mr. McNaughton and complainant did not have a good working relationship and both reported this to Mr. Hall. Complainant and Mr. Hall met every other week to discuss her work performance. At the conclusion of these meetings, Mr. Hall would give complainant a quick "A-frame" hug, i.e., bodies close in the area of the head and shoulders and less close below the shoulders.

2. During the 1991-92 AY, complainant was a first-year graduate student. A requirement of her graduate program was the completion of a semester of practicum experience. Complainant was enrolled in the practicum course in the fall of 1991 and was assigned to the Center. Robert Hoyt was the director of the Center at this time and Mr. McNaughton held a position in the Center parallel to that of Mr. Hall. Mr. Hall served as complainant's practicum supervisor due to the previous problems complainant and Mr. McNaughton had experienced in their working relationship. Respondent allowed

complainant to count some of her practicum hours as work study hours (for pay).

3. During the fall of 1991, Mr. Hall met with complainant once a week to discuss the counseling of students she was doing as part of her practicum. During these meetings, Mr. Hall held complainant's hands and arms in his hands on occasion, gave her an A-frame hug at the end of their meetings, and placed his hands on her face to demonstrate a communication technique. Mr. Hall has held the hands of both female and male practicum students to demonstrate a technique to connect with a client or to comfort or encourage a student. Mr. Hall hugged complainant to release tension after critiquing her performance or to celebrate a good counseling experience with her. In demonstrating the communication technique by touching her face, Mr. Hall sat close to complainant and their knees touched.

4. Complainant alleges that, in the fall of 1991 during these weekly meetings, Mr. Hall did the following:

- a. On one occasion, while they were both standing, Mr. Hall pulled her close, swayed from side to side, rubbed her back, and told her that she felt so good; complainant alleges that she told Mr. Hall not to get so close or to touch her so much.
- b. On one occasion, Mr. Hall put his head in her lap and held her thighs with his hands.
- c. On more than one occasion, Mr. Hall kissed her forehead and, on some of these occasions, would touch her hair or her shoulders.
- d. On more than one occasion, Mr. Hall would place his hands on hers and rub her thighs.
- e. On more than one occasion, Mr. Hall would pinch her arms when they were walking up the stairs together; complainant alleges that she told Mr. Hall that his actions were causing her pain.

Mr. Hall denies that any of these incidents occurred.

5. The incidents described in Finding of Fact 4 either did not occur as alleged or were not unwelcome.

6. During the fall of 1991, complainant recommended to Janet Carlson, a friend, that Ms. Carlson take an independent study from Mr. Hall during the

spring 1992 semester. Complainant did not indicate to Ms. Carlson that Mr. Hall had engaged in any incidents of inappropriate touching with her.

7. As a part of the practicum, complainant kept a journal relating to her counseling activities. This journal was to be provided to her academic supervisor, Arlene Cooper, not to Mr. Hall, at the end of the semester. In an entry dated October 29, 1991, complainant indicated as follows in relation to Mr. Hall: "he has such faith in me. . . , he has done a lot to restore what John D. [Deutcher] took away from me. . . , I really enjoy this man as a supervisor. . . , he was a fine listener for me today," [after telling Mr. Hall that her father had recently died]. Complainant testified at hearing that she made a conscious decision not to write about Mr. Hall's sexual harassment of her because others had access to these journals and because the entries were supposed to deal only with her interactions with her counselees. The journal entries were made by complainant at her home and, at the end of the semester, were placed in a box in her academic supervisor's office or in a box behind a partition in the academic department's main office.

8. Complainant elected to take an advanced practicum course during the spring of 1992 and requested that Mr. Hall be her practicum supervisor. This was not a required course for complainant's graduate degree.

9. Mr. Hall recommended to complainant that her practicum be supervised by both Mr. Hall and Mr. McNaughton so that complainant and Mr. McNaughton would have an opportunity to work out the difficulties in their relationship. As a result, complainant and Mr. Hall met only every other week to discuss her counseling of students.

10. Complainant alleges that, during the spring 1992 semester, Mr. Hall continued to carry out the actions described in Findings of Fact 4(c) and 4(d), above. In addition, complainant alleges the following:

a. During one of their regular meetings, complainant mentioned to Mr. Hall that she had undergone breast reduction surgery in the summer of 1991, and, after mentioning this, Mr. Hall would comment that she was now "so small," that she was so much better when she was bigger, and would make motions with his hands which she interpreted as relating to the reduction in the size of her breasts;

b. On one occasion, Mr. Hall stated that he bet that she had a lot of sexual fantasies, that she was sexy and didn't she think that her male clients came back to her because they found her sexually

attractive, and that if he were a young man he'd come back to her because she could probably get these guys' hormones going.

Mr. Hall denies that any of these incidents occurred or that any of these statements were made. Mr. Hall admits engaging in a conversation with complainant in which she advised him of her breast reduction surgery and her feeling that too much tissue had been removed, and commenting that he thought that she looked fine.

11. The incidents described in Finding of Fact 10, above, either did not occur as alleged or were not unwelcome.

12. Complainant alleges that, during the fall of 1991, she told Mr. Hall not to get so close and not to touch her so much; that, during early January of 1992, she told Mr. Hall that she "no longer wanted to flirt with him, didn't want him touching her any more, and wanted to keep their relationship on a businesslike or professional keel;" and that, after his comments relating to sexual fantasies and hormones, she told him not to talk like that to her because it was demeaning to her, her clients, and her professional skills, and he was now sexually harassing her and she wanted him to stop. Complainant testified that Mr. Hall's behavior became objectionable to her in the spring 1992 semester.

13. On April 16, 1992, complainant met with Virginia Wolf, the UW-Stout Affirmative Action Officer. Complainant advised Ms. Wolf that she felt that Mr. McNaughton and Mr. Deutcher were discriminating against her because of her sex. When complainant told Ms. Wolf that Mr. McNaughton and Mr. Deutcher treated male students in the same rigid, controlling, and demeaning manner, Ms. Wolf advised her that this was probably not sex discrimination. Complainant did not complain to Ms. Wolf regarding any actions or statements by Mr. Hall. Complainant provided detailed testimony at hearing relating to information she allegedly had given to Ms. Wolf relating to Mr. Hall's sexual harassment of her.

14. On or before April 1, 1992, complainant met with Arlene Cooper, the academic supervisor of her practicum course, advised Ms. Cooper that she had a personality conflict with Mr. McNaughton, and requested that Mr. Hall be her only practicum supervisor. During the spring of 1992, complainant never told Ms. Cooper that Mr. Hall was sexually harassing her or otherwise engaging in inappropriate behavior. During the spring of 1992, complainant told Ms. Cooper that she enjoyed her practicum experience with Mr. Hall and

his supervision of her was very good. Complainant and Ms. Cooper met again on April 16, 1992. During this meeting, complainant told Ms. Cooper that she wanted to drop all her courses and withdraw from school because she was behind in many of her classes and was feeling overwhelmed. Complainant did not attribute her desire to withdraw from school to any actions on the part of Mr. Hall.

15. Complainant met with Robert Hoyt, Director of the Counseling Center, in July of 1992. Complainant and Mr. Hoyt discussed her concern about the grade she had received from Mr. McNaughton for the spring 1992 practicum. Ms. Rutland did not complain to Mr. Hoyt about Mr. Hall. Complainant was aware that Mr. Hoyt was Mr. Hall's supervisor.

16. In August of 1992, complainant met with UW-Stout Chancellor Sorenson and told him that she had left school because of sexual harassment by Mr. Hall, and that Mr. Hall had lowered her grade when she had rebuffed his sexual advances. Chancellor Sorenson contacted Ms. Wolf who met with complainant and initiated an investigation of complainant's allegations.

17. As a part of her investigation, Ms. Wolf interviewed 30 former counselees or practicum students of the Center, 24 female and 6 male. Of these, 5 females indicated to her that Mr. Hall had engaged in actions which made them feel uncomfortable. The statements of the five females are summarized as follows:

a. SD--a practicum student who, at the time of hearing had been married 30 years and had 6 children--according to Ms. SD, on November 8, 1990, Mr. Hall told her that she was too stiff in her interactions with students; that he wanted to take her and shake her and wake her up; and that she dressed too "establishment" for the students to relate to her. According to Ms. SD, she asked him if she should dress like a sleaze and he laughed and said he would enjoy that; that, on one occasion, Mr. Hall told her that she was the best looking woman who had come through there in a long time; and that, in her meetings with Mr. Hall, he was very dramatic and she interpreted this as his effort to manipulate her. Ms. SD testified that she told her grad student partner Michael Robinson about her problems with Mr. Hall and that she cried and Mr. Robinson "held her for a long time."

The record shows that Mr. Hall had received complaints from two of Ms. SD's clients that she seemed distant and aloof; that it was very unusual to receive such complaints; and that, as a result, Mr. Hall discussed the substance of these complaints with Ms. SD and shared with her his impression that her formal style of dress may be contributing to the impression she was creating with these

students. Mr. Hall denies telling Ms. SD she was the best looking woman who had come through there in a long time.

b. KN--counselec--Ms. KN alleges that, during her counseling by Mr. Hall, he told her that she was good looking and should have no trouble dating; he put his hand on her shoulder and once put his hands on her knees and that, since her family was not physically close, it strikes her as odd when other people are. Ms. KN did not complain to anyone about Mr. Hall's actions.

The record shows that the discussion of Ms. KN's dating occurred after she mentioned to Mr. Hall that relationships with men were one of the sources of her stress; and that it would have been inconsistent with Mr. Hall's usual counseling practice to express an opinion on her appearance.

c. JC--independent study with Mr. Hall--according to Ms. JC, at the end of one meeting with Mr. Hall where they discussed a matter which she considered private and personal and which she may have initiated the discussion of, he gave her a tight hug without having asked her permission. Ms. JC did not complain to anyone about Mr. Hall's actions.

d. SW--practicum student--according to Ms. SW, on six or seven occasions, Mr. Hall put his arm around her shoulders as she was on her way out of a meeting with him; on one occasion, he put his hands on her shoulders and touched his body to hers from behind her; that he commented on the way she dressed (in a non-sexual way) which made her uncomfortable because it made her unsure whether she was dressing appropriately for her counseling activities; and, on one occasion, stated, "I'll bet you freckle in the sun." which she considered "very inappropriate." Ms. SW did not complain to anyone about Mr. Hall's actions.

e. JT--practicum student--according to Ms. JT, Mr. Hall would occasionally hug her at the end of their meetings together; and, on one occasion during their regular meetings to discuss her practicum, she volunteered that she had recently moved in with her boyfriend and was worried how to tell her parents, that Mr. Hall told her to tell them because the sex was great, and that this comment "shocked and distressed" her and she told Mr. Hall that she didn't appreciate it. Ms. JT did not complain to anyone about Mr. Hall's actions.

Ms. Wolf reported her investigative findings and conclusions to Chancellor Sorenson and to complainant, and made recommendations in her report as to remedial actions, e.g., training, which Mr. Hall should complete. Mr. Hall completed these recommended actions.

18. There is a counseling technique called "therapeutic touch" in which a counselee is touched by a counselor as a means of reassurance or support.

After 1987, it was Mr. Hall's practice to request permission of a counselee before using this technique. Complainant used this technique with certain of her counselees.

19. In 1987, the father of a student counselee complained to the UW-Stout Chancellor that he felt Mr. Hall had engaged in the inappropriate touching of his daughter. This touching consisted of Mr. Hall placing the side of his face against the side of the student's face and making a kissing motion and sound with his mouth. This action resembles a common form of greeting in Europe. Mr. Hall failed to mention this incident to Ms. Wolf during her investigation of complainant's sexual harassment allegations.

20. Mr. Hall recommended a grade of B+ for complainant for her practicum in the fall 1991 semester and a grade of A-/B+ for the spring 1992 semester. The grade Mr. Hall recommended for complainant for the spring 1992 semester was the same as the grade he recommended for a male practicum student. The final grade was determined by Ms. Cooper.

21. During the spring 1992 semester, when Mr. McNaughton and Mr. Hall discussed with complainant changes they would suggest in her counseling style, complainant indicated she felt they were trying to change her personality and resisted making the changes. During this time, complainant was also experiencing problems working with and taking suggestions from Pat Kuchera, the supervisor of the career lab in the Center.

22. Mr. Hall has been an actor for more than 40 years and tends to be dramatic and demonstrative in his interactions with both men and women.

23. Respondent had a process in place for addressing complaints of sexual harassment. This process was followed by Ms. Wolf in investigating complainant's allegations of sexual harassment. Complainant was familiar with this process at all times relevant to this matter.

Conclusions of Law

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

2. Complainant has the burden to show by the preponderance of the credible evidence that she was discriminated against as alleged.

3. Complainant has failed to sustain this burden.

Opinion

The Wisconsin Fair Employment Act defines sexual harassment as:

s. 111.32(13), Stats. (1991-92) "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 . . .

111.36(1), Stats. (1991-92) Employment discrimination because of sex includes, but is not limited to, any of the following actions by an employer . . .

* * *

(b) Engaging in sexual harassment; or . . . to create an intimidating, hostile or offensive work environment. Under this paragraph, an employer . . . is presumed liable for an act of sexual harassment by that employer . . . if the act occurs while the complaining employe is at his or her place of employment or is performing duties relating to his or her employment, if the complaining employe informs the employer . . . and if the employer . . . fails to take appropriate action within a reasonable time.

Complainant claimed that Mr. Hall discriminated against her on the basis of sex (sexual harassment) from September of 1991 to May of 1992. Since the complaint was filed on November 5, 1992, and there was no timely allegation of a continuing violation or of a pattern or practice of discrimination, the actionable period is the prior 300 days, i.e., from January 10, 1992 to November 4, 1992.

In concluding that Mr. Hall did engage in the sexual harassment of complainant, the hearing examiner relied to a great extent on her analysis of the relative credibility of these two individuals. The Commission does not find, however, that the record supports the hearing examiner's conclusion in this regard. Specifically, the Commission finds as follows:

1. The following support a finding that the incidents of sexual harassment alleged by complainant to have occurred in the fall of 1991 and prior either did not occur as alleged or were not unwelcome:

a. Complainant's testimony that Mr. Hall's actions did not become objectionable until the spring semester semester of 1992;

b. Complainant's failure to note any of the incidents of alleged harassment in her journal. Although complainant indicated that she did not do so because others had access to these journals and she did not want to risk others seeing and disseminating her criticisms of her superiors, the record shows that she included criticism of Mr. Deutcher, a faculty member, in one of her journal entries. Complainant offered as another explanation her understanding that the journal was to be used only for the purpose of noting her interactions with her counselees. The record shows, however, that one of complainant's entries concerned the death of her father and her discussion of this with Mr. Hall.

c. Complainant's statement in her journal that she really enjoyed Mr. Hall as a supervisor.

d. Complainant's recommendation to one of her friends of Mr. Hall as a supervisor for an independent study.

e. Complainant's request that Mr. Hall be her practicum supervisor for the spring 1992 semester.

f. Complainant's failure to report Mr. Hall's alleged actions to any supervisor/administrator/faculty member while, at the same time, complaining openly about Mr. McNaughton and Mr. Deutcher.

2. The following support a finding that the incidents of sexual harassment alleged by complainant to have occurred during the spring 1992 semester either did not occur as alleged or were not unwelcome:

a. Complainant's failure to report Mr. Hall's alleged actions to any supervisor/ administrator/faculty member while, at the same time, complaining openly about Mr. McNaughton and Mr. Deutcher.

b. Complainant's request to have Mr. Hall as her sole practicum supervisor midway through the semester.

3. The following seriously undermine complainant's credibility:

a. Complainant told Chancellor Sorenson that Mr. Hall had lowered her grade when she had rebuffed his sexual advances but the record shows that Mr. Hall's grading of her practicum had actually improved from the fall 1991 grade of B+ to the spring 1992 grade of A-/B+.

b. Complainant's misrepresentation that she had reported to both Ms. Cooper and Ms. Wolf in the spring of 1992 that Mr. Hall had been sexually harassing her. The question of what complainant did to report Mr. Hall's actions is an extremely important element of this proceeding and complainant's misrepresentations in this regard seriously undermine her case.

The hearing examiner points to complainant's memory of specific details of certain of the alleged incidents of sexual harassment as evidence supporting her credibility. However, complainant also testified to specific details of her reporting of Mr. Hall's actions to Ms. Cooper and Ms. Wolf in April of 1992 which both the hearing examiner and the Commission have concluded did not occur.

The incident upon which the hearing examiner bases her conclusion that Mr. Hall was not as credible as complainant was that relating to his failure to tell Ms. Wolf about the 1987 complaint against him by a student's father. It should first be noted that this was a single incident removed in time by 5 years from complainant's meetings in 1992 with Ms. Wolf to discuss complainant's allegations of sexual harassment; and that others with whom Ms. Wolf spoke at UW-Stout also did not recall this incident or relate it as an incident with sexual overtones. However, even if it were concluded that Mr. Hall was not credible in regard to this incident, this single credibility deficiency does not compare to the numerous deficiencies cited above in regard to complainant's credibility.

The record also includes the testimony of five other females relating to touching or comments by Mr. Hall that they felt were inappropriate. For the following reasons, these incidents do not support a conclusion that Mr. Hall had a tendency to engage in sexual harassment:

1. Several did not involve touching or comments of a sexual nature, e.g., Mr. Hall's statement to Ms. S.W. that "I'll bet that you freckle in the sun;" and Mr. Hall's comments to Ms. S.W. relating to the way she dressed.

2. Several of the discussions relating to matters which these women felt were inappropriate were initiated by the women themselves, e.g., Ms. K.N.'s mention to Mr. Hall during a counseling session that relationships with men were one of the sources of her stress; and Ms. J.T.'s mention during a practicum evaluation session with Mr. Hall that she had recently moved in with her boyfriend.

3. The incidents of touching or comments, even if true, were isolated and not sufficiently severe to constitute sexual harassment.

The Commission concludes that complainant has failed to show that she was sexually harassed by Mr. Hall as alleged.

Even if complainant had satisfied her burden to show that Mr. Hall sexually harassed her, the Commission concludes that respondent would not be liable for that harassment.

Sexual harassment claims arising under Wisconsin's Fair Employment Act may properly look to cases under the federal Title VII law as guidance in resolving the state claim. Zabkowitz v. West Bend Co., 589 F.Supp 780, 35 FEP Cases 610 (1984), aff'd in relevant part, 789 F.2d 540, 40 FEP 1171 (7th Cir. 1986). Under federal law, agency principles are used to determine whether the employer may be held liable for acts of its supervisors or co-workers. Meritor Savings Bank v. Vinson, 477 US 57, 40 FEP Cases 1822, 1829 (1986) [referring specifically to Restatement (Second) of Agency ss. 219-237 (1958), hereafter referred to as "The Restatement"]. The seventh circuit has since used such analysis for at least one harassment claim. North v. Madison Area Assn. for Retarded Citizens, 844 F2d 401, 405, 46 FEP Cases 943, 948 (7th Cir. 1988).

The text of s. 219 of The Restatement is shown below:

s. 219. When Master is Liable for Torts of His Servants

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
 - (a) the master intended the conduct or the consequences, or
 - (b) the master was negligent or reckless, or
 - (c) the conduct violated a non-delegable duty of the master,or
 - (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

The majority of acts which complainant claims were acts of sexual harassment were carried out by Mr. Hall during his evaluation of complainant's practicum performance. The primary emphasis of this

practicum was on its academic aspect, not its employment aspect, although, due to complainant's receipt of some work study credit for this practicum, it will be presumed that some elements of an employment relationship were present. During these sessions, Mr. Hall was conducting an evaluation of complainant's performance on behalf of the employer, complainant attended such sessions relying upon Mr. Hall's authority to evaluate her, and Mr. Hall allegedly used this authority to further the harassment. Accordingly, potential liability exists for the employer under s. 219(2)(d) of The Restatement.

The principles behind s. 219(2)(d) of The Restatement were discussed in Karibian v. Columbia Univ., 14 F3d 773, 63 FEP Cases 1038, 1044, rev'g and rem'g 61 FEP Cases 66 (2d Cir. 1994), where the court stated as shown below:

We have not yet had occasion to address the proper standard of employer liability where, as here, the plaintiff's supervisor created a discriminatorily abusive work environment through the use of his delegated authority. Common law principles of agency suggest that in such circumstances the employer's liability is absolute.

* * *

We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. (Cites omitted.) In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it". (Cites omitted.)

Under these circumstances, a potential exists for employer liability to attach under s. 219(2)(d) of The Restatement. (Also see, e.g., Rauh v. Coyne, 774 F.Supp. 1186, 1190 (D.C. Dist. Ct. 1990).)

The Commission, however, does not find employer liability in this case due to the following:

1. The hybrid of academic and employment elements presented by the practicum relationship of complainant and Mr. Hall--as a result, it is difficult for the Commission to draw a clear conclusion that Mr. Hall had the actual or apparent authority to alter complainant's employment (to hire, fire, or

promote) or to affect to a sufficient extent the incidents of complainant's employment (such as rate of pay or discipline); See Hunter v. Allis-Chalmers Corp., Engine Division, 797 F.2d 1417, 41 FEP Cases 721 (7th Cir. 1986); North v. Madison Area Assn for Retarded Citizens, 844 F.2d 401 (7th Cir. 1988).

2. The presence of a clearly articulated and publicized policy prohibiting sexual harassment and providing for retaliation-free reporting to an individual other than Mr. Hall with the authority to remedy the problem; See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

3. Complainant's failure to utilize the respondent's reporting policy despite her knowledge of the policy and her many opportunities to utilize it; See Juarez v. Ameritech Mobile Communs., Inc., 957 F.2d 317 (7th Cir. 1992).

4. Respondent's prompt action to investigate and take remedial action once the alleged harassment was reported in accordance with the policy. See Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).

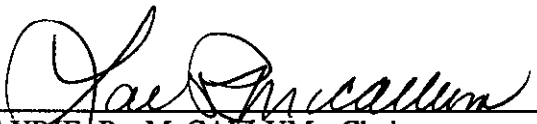
Complainant complained to authorities about many things, but failed to raise her discrimination concerns until after the employment relationship ended despite her knowledge of respondent's sexual harassment policy and reporting process and her familiarity with the issue of sexual harassment as the result of course work she had completed. She thereby deprived respondent of an opportunity to correct the allegedly harassing situation while she was employed. Further, her failure to report her discrimination concerns sooner was due to her own actions and not to any deficiency on the part of respondent's complaint process. Once the employer became aware of complainant's concerns regarding Mr. Hall, it acted appropriately and promptly.

Order

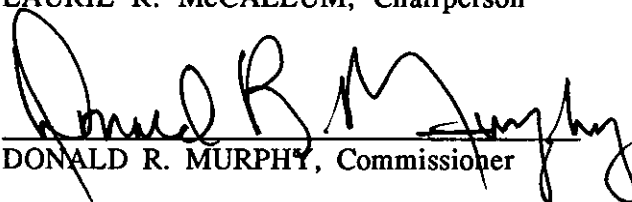
This case is dismissed.

Dated June 22, 1995.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner

Under the particular facts of this case, I agree with the finding of no employer liability due to Ms. Rutland's failure to utilize the university's internal procedures for reporting suspected sexual harassment. (See, EEOC: Policy Guidance on Sexual Harassment (3/19/90), FEP Manual, Vol. 8, 405:6611, example given at 405:6698.) However, I disagree with the credibility assessments stated in the majority opinion.

I believed Ms. Rutland's testimony of touching and comments made by Professor Hall (as noted in the proposed decision) and that such behaviors were inappropriate. My strong impression of Professor Hall was that he had an ingrained persona of being a demonstrative, touching person in his interactions with others; as well as an inability to understand that behaviors arguably appropriate for peers could be considered or perceived as inappropriate for subordinates.

I also believed that the counselling technique of therapeutic touching was not a motive for any of his actions. Rather, it was an excuse offered after-the-fact to justify only some of his questionable behaviors.

My reasons for these credibility determinations were discussed in the proposed decision to some extent. Those determinations also were based on the opportunity to observe these witnesses over several days of hearing. Credibility determinations based on witness demeanor factors are difficult to reduce to persuasive written argument. I cannot help but wonder whether the

majority's credibility assessments would have been different if the other Commissioner's had had the same opportunity as I did to observe these witnesses.


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