

STATE OF WISCONSIN

PERSONNEL COMMISSION

STEPHANIE MASSART

Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (LA CROSSE)**

Respondent.

RULING

Case No. 00-0029-PC-ER

On June 2, 2000, respondent filed motions to dismiss for untimely filing and for failure to state a claim. The parties were permitted to file briefs and the final brief was filed on September 8, 2000. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. Complainant filed this charge on March 7, 2000, alleging sex discrimination (sexual harassment).

2. During the time period relevant to this matter, complainant was employed as a graduate assistant for respondent. Complainant's appointments to this graduate assistantship were for the periods August 25, 1997, to May 24, 1998, and August 31, 1998, to May 30, 1999. Pursuant to this assistantship, complainant worked 14 hours a week for the UW-LaCrosse College of Health, Physical Education, and Recreation. Daniel Sweetman, Environmental Health, Safety, and Risk Manager, was complainant's first-line supervisor, and she shared an office with him in the Maintenance and Stores Building on campus. During this period of time, complainant also attended UW-La Crosse as a graduate student.

3. Also present in the Maintenance and Stores building were employees of the UW-LaCrosse physical plant. Although complainant spent most of her work time in the office she shared with Mr. Sweetman, she had contact with other building employees during trainings provided to these employees by the program in which she was employed, and in the building break room. Two of the physical plant employees with whom she came in contact were John Hagenah, Maintenance Mechanic 3, and Pat Verse, Facility Repair Worker 3.

4. In her charge of discrimination, complainant alleges as follows, in relevant part:

I was employed by Respondent from September 1997 to June 1999 as a Graduate Assistant. During that time period, co-worker John Hagenah frequently made inappropriate comments to me. Examples include regularly calling me "sweetheart," "doll," "good looking," making comments about my clothing, and comments about my body such as "your legs are so white," "you don't need to work out because you look good the way you are."

Mr. Hagenah also left flowers on my desk, whistled at me frequently while I was walking on campus, would drive behind me or in front of me in Respondent's van as I walked through campus, would share dirty jokes off the Internet and at least once after commenting that it looked like I lifted weights, he squeezed my biceps.

Similarly, co-worker Pat Verse acted inappropriately towards me on a number of occasions. For instance, frequently when Mr. Verse would walk by my desk, he would pull my ponytail or braid or massage my shoulders. Pat Verse also called me "doll" and "wild woman." On a number of these instances, my supervisor, Dan Sweetman, or supervisor Mike Daniels observed Mr. Hagenah's and Mr. Verse's comments and conduct. Additionally, I repeatedly told my supervisor, Dan Sweetman, that the employees desperately needed sexual harassment training. Further, inappropriate comments or actions that a supervisor did not observe I reported immediately.

5. Complainant did not specify the date any of these incidents occurred either in her charge of discrimination or in subsequent filings.

6. Complainant alleges that, on May 27, 1999, while she was in the Geography Computer Lab of Crowley Hall on the UW-La Crosse campus, working on her graduate thesis, Mr. Hagenah used a key to open the door, and attempted repeatedly to handcuff complainant, grabbing her wrists and arms in the process, despite complainant's continued protestations and attempts to get away from him.

7 Complainant reported the incident of May 27 to Mr. Sweetman after she arrived at work on May 28. This was complainant's first report of the incident to respondent. Mr. Sweetman immediately reported the incident to his supervisors and to the Assistant to the Chancellor for Affirmative Action and Diversity and to the Director of Protective Services. Pursuant to advice she received from these individuals, complainant filed a complaint with the UW-LaCrosse Office of Affirmative Action and with the LaCrosse Police Department.

8. The next work day after May 28, Mr. Hagenah was suspended with pay by respondent pending an investigation of complainant's charges. Complainant did not cooperate with this investigation upon the advice of her attorney. As a result of this investigation, Mr. Hagenah's employment was terminated by respondent.

OPINION

Respondent's first argument is that those allegations other than the one related to the incident of May 27 are untimely filed.

Pursuant to §111.39(1), Stats., claims under the Fair Employment Act (FEA) must be filed "no more than 300 days after the alleged discrimination occurred." Here, complainant filed her FEA charge on March 7, 2000¹, and the actionable period under the FEA would, as a result, be May 12, 1999, through March 7, 2000.

Complainant has failed to allege any incident which occurred during this actionable period other than the incident of May 27, 1999. (See Finding 6, above).

¹ Although complainant did not file her perfected complaint with the Commission until March 16, 2000, the date of filing would relate back to the date that she filed with the Commission a complaint on a form utilized by the Equal Rights Division, i.e., March 7, 2000.

Complainant argues that her complaint should be considered timely filed as it relates to the other alleged incidents of sexual harassment (See Finding 4, above) through application of a continuing violation theory. One purpose of applying a continuing violation theory in a context such as the one here is to protect the employee who would have had no reason to believe that she was being harassed until a series of adverse actions established a visible pattern of discriminatory treatment. *Prochnow v. UW*, 97-0008-PC-ER, 8/26/98; *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 50 FEP Cases 1474 (7th Cir. 1989). Here, however, it is not necessary to determine when a person similarly situated to complainant should have reasonably concluded that she was being harassed. Instead, complainant acknowledges that the alleged harassment began no later than January of 1998 (see 8/17/00 brief, p. 4), and that she reported each incident to her supervisor which he or another supervisor had not observed and repeatedly suggested to her supervisor that these employees would benefit from sexual harassment training (See Finding 4, above). Obviously, complainant does not dispute that she had formed a belief prior to the actionable period that she was being harassed by Mr Hagenah and Mr. Verse. This belief triggered complainant's duty to file a complaint, which she failed to do until more than 300 days later. It is concluded that complainant's charge of discrimination was untimely filed as to those allegations other than the one which occurred on May 27, 1999.

In its motion to dismiss for failure to state a claim, respondent argues that it could not be held liable under the FEA for the incident of May 27 since the incident did not occur while complainant was at her work site or performing work duties for respondent, and since respondent took appropriate action within a reasonable time to address the incident.

In *Bender v. DOR*, 87-0032-PC-ER, 8/24/89, the Commission, citing *Zabkowicz v. West Bend Co*, 35 FEP Cases 610 (W.D. Wis. 1984), concluded that, in order to prevail on a claim of co-worker sexual harassment under the FEA, the complainant must show that the respondent knew or should have known of the harassment but failed to take immediate and appropriate corrective action. (See, also, §111.36(3), Stats.) The

only incident still under consideration here is the one that occurred on May 27. Complainant has not contended that respondent knew or should have known of this incident until she reported it to her supervisor on May 28, and has not disputed that, once she reported it, respondent took immediate and appropriate corrective action by investigating the allegation and, after investigation, by terminating Mr. Hagenah's employment. It is concluded, based on the undisputed facts, that complainant would not be able to satisfy one of the required elements of proof in regard to her remaining sexual harassment claim and as a result, has failed to state a claim for relief in this regard. *See, Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 78 FEP Cases 1329 (7th Cir 1998). In view of this conclusion, it is not necessary to address respondent's remaining argument relating to the effect of the location of the May 27 incident on respondent's liability under the FEA.

CONCLUSIONS OF LAW

1. Complainant has the burden to show that her charge of sexual harassment was timely filed.
2. Complainant has satisfied this burden as to the incident of May 27, 1999.
3. Complainant has failed to satisfy this burden as to any of the other incidents of alleged sexual harassment.
4. Respondent has the burden to show that complainant has failed to state a claim for relief as to the incident of May 27, 1999.
5. Respondent has sustained this burden.

ORDER

Respondent's motion to dismiss is granted and this complaint is dismissed.

Dated: October 18, 2000

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:000029Cru12


JUDY M. ROGERS, Commissioner

Parties:

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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