

DAVINIE ANDREWS,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

**RULING
ON
SCOPE OF
ISSUES**

Case No. 99-0038-PC-ER

This matter is before the hearing examiner on a dispute as to the appropriate scope of the proceeding. During a prehearing conference on February 23, 2001, a representative of the Commission proposed the following statement of issue for hearing:

Whether respondent discriminated against complainant based on her sexual orientation when it terminated her probationary employment as a Resident Care Technician 1 on August 12, 1998.

Complainant argues that the issue should encompass respondent's conduct prior to the termination. She alleges that this conduct constituted harassment based on sexual orientation. Respondent characterizes the expansion of the issue for hearing beyond the termination of probationary employment as an attempt to amend the complaint, and objects to an amendment and to consideration of the issue of harassment. The parties have filed written arguments. The following findings are based on documents in the file and appear to be undisputed, and are made solely for the purpose of resolving the controversy regarding the scope of the issue.

FINDINGS OF FACT

1. Complainant, who has been representing herself throughout this proceeding, filed her complaint with the Personnel Commission on March 2, 1999. In the portion of the complaint form for indicating the "cause of discrimination/retaliation", complainant checked the box for sexual orientation and indicated the discrimination related to "discipline" and "harassment" by checking both of these boxes. Complainant

attached a 7 page typed narrative explaining "why I feel that I was harassed (based on sexual orientation) and eventually fired without valid reason." The narrative reflected the following:

a. Complainant began working as a Resident Care Technician at Winnebago Mental Health Institute (WMHI) on September 29, 1997. After she took a training class, she was temporarily assigned to Petersik Hall South for several months. She then worked as part of the float pool for 2 months before she was assigned to Petersik Hall North where Jonni Janikowski was her supervisor.

b. After complainant worked approximately 1 month on Peterski Hall North, respondent prepared complainant's third 3-month probationary evaluation and convened a meeting on July 1, 1998, with the complainant regarding her performance.

c. According to complainant, Ms. Janikowski commented during the course of the July 1st meeting that: i) She had received a report that complainant had left an unwrapped sanitary pad in the waste can of the employee's restroom; ii) complainant had been seen leaving the restroom with feces on her hands; iii) complainant was never to mention her sexual orientation on the work unit again because some employees found it to be offensive (complainant interpreted this comment to mean that she was told not to mention her family); iv) a staff member had reported that in response to a question as to whether she was married, complainant said "no, I prefer women"; and v) she told complainant to keep careful track of her break times. Complainant felt the review of her work constituted harassment because Ms. Janikowski had incorporated "personal opinions, and unsubstantiated, cruel comments into my review."

2. Complainant alleges respondent informed complainant that her work performance would be closely monitored and she would be given weekly feedback.

3. Complainant alleges Ms. Janikowski only met once with complainant over the course of the next month to discuss complainant's progress.

4. Complainant alleges respondent placed signs in the employee's restroom. One read: "Please wrap all sanitary products." The other initially read "Please wash

hands before returning to work." It was subsequently moved to another location in the restroom and the following note was added: "with soap for 20 seconds."

5. Complainant alleges that during at least part of the time complainant was employed at WMHI, her daughter was a resident of the facility. When complainant worked at Peterski Hall North, she received a phone call at work from her daughter's social worker. A nurse employed by respondent later informed complainant that even though both complainant and the social worker were WMHI employees, it was a "personal" call and complainant needed to take it at a pay phone during her lunch break.

6. Complainant alleges Ms. Janikowski initially considered complainant late for work when complainant took time off to attend her daughter's court appearance, even though the nursing supervisor, Darleen Kemp, had approved the leave in advance. Ms. Kemp subsequently straightened it out with Ms. Janikowski (and respondent did not consider complainant to have been late for work).

7 Complainant alleges (p. 6 of her complaint) she made an appointment and spoke with a nursing administrator (Jane Walters) in the facility, explained what was occurring in the unit and asked for a transfer. "She asked me if I was feeling harassed and I said yes. She also stated that she felt that my situation on the unit should be further investigated 'at the next level' because of harassment. [but] I never heard back from her."

8. Complainant states (p. 6 of her complaint) that due to 60 hour work weeks and "the immense stress from the harassment", she became severely depressed, was hospitalized for 3 days and away from work for several more days.

9. By letter dated August 13, 1998, respondent notified complainant that her employment as a Resident Care Technician 1 had been terminated.

10. By letter dated March 8, 1999, the investigator directed the respondent to submit an answer in this case. This letter includes the following:

Pursuant to §PC 2.04, Wis. Adm. Code, the Commission directs you to file an answer to the complaint and any supplemental materials that have been submitted by complainant, including "a statement regarding each allegation in the complaint, the respondent's version of the un-

derlying facts, copies of documents relating to the allegations and the assertion of any legal defenses to the allegations." Your answer is due by **April 23, 1999**. You should also serve a copy of your answer on complainant or complainant's representative, if appropriate, at the address shown on the complaint form.

In addition to any other information you deem relevant, your answer should include responses and materials relative to the following inquiries:

- 3) Submit copies of all relevant rules pertaining to employe duties and conduct relating to personal hygiene and wash room etiquette. Explain how employes learn the contents and rules.
- 4) Explain J. Janikowski's comments to complainant during the third performance review meeting (on 7/1/98) regarding complaints Janikowski had allegedly received from "unnamed persons" about complainant's personal hygiene and wash room etiquette. Identify the "unnamed persons" who complained and identify the person[s] who posted the signs on the wash room walls. Explain whether these signs were posted for complainant's benefit.
- 5) Identify any other probationary RCT who has been spoken with about personal hygiene and wash room etiquette, and explain what was done in these instances. Explain whether similar signs were posted in the wash room in these other circumstances.
- 6) Explain why J. Janikowski made the "closing comment" to complainant during the third performance review (on 7/1/98) that she "was never again to mention [her] sexual orientation on the unit, as some of the employes found it offensive." Identify the employes who "found it [complainant's reference to her sexual orientation] offensive," and explain what these employes found offensive or complained about.
- 7) Submit copies of or explain all relevant rules pertaining to employes discussing their personal lives on the job. Explain how employes learn the contents and rules. Explain what, if anything, differentiates J. Janikowski's talk of family matters and complainant's talk of personal matters (noted @¶2, pg. 4 of narrative).
- 8) Submit copies of and/or explain respondent's performance monitoring procedure. Explain how complainant's performance was moni-

tored, and explain why, as complainant alleges, she was not provided with specific and additional work performance guidelines.

- 9) Identify any other probationary RCT who has been placed on a 30 day performance monitoring schedule, provide the date and explain the outcome of the performance monitoring efforts.
- 10) Submit copies of or explain all relevant rules pertaining to employees taking telephone calls from health care or service providers who are caring for their family members. (See complainant's narrative pg. 4, ¶4, pg. 5, ¶1) Explain why complainant was told she could not take calls from a social worker regarding her daughter's health.
- 11) Submit copies of or explain all relevant rules pertaining to employee absences, with or without a doctor's excuse. Explain why complainant's absence in early August 1998 was allegedly not excused.

11. Respondent filed an answer to the complaint on April 23, 1999. The answer characterized the complaint as follows: "The complaint alleges that the termination by the employer was motivated by discrimination based upon Ms. Andrews' sexual orientation."

12. In her reply to respondent's answer, complainant compared her final performance evaluation to the earlier evaluations issued to her and responded to specific alleged events that were, per respondent, a part of the decision to terminate complainant's employment. As part of her response regarding the question of her hygiene, she wrote: "This was not constructive criticism--it was harassment."

13. One of the Commission's investigators issued an Initial Determination on December 12, 2000. The Initial Determination read, in part:

On March 2, 1999, complainant filed a discrimination/retaliation complaint with the Personnel Commission alleging respondent discriminated against complainant because of complainant's sexual orientation in violation of the Fair Employment Act, Subchapter II, Ch. 111, Stats. in its decision to terminate her probationary employment in August 1998.

12. On July 1, 1998, Ms. Janikowski met with complainant and gave her a verbal reprimand for the June 18 "No Call" (¶10), and conducted complainant's third performance review for the report period of 3/29/98 - 6/29/98

13. Complainant said the above evaluation meeting (§12) made her realize that she was a victim of harassment. Complainant felt the hygiene and bathroom issues were harassment and claimed she showered daily, and she felt that the timing of someone placing signs in the wash room that stated, "Please wrap all sanitary products" and "Please wash hands before returning to work" were meant for her benefit. According to complainant, the most scathing harassment occurred at the close of the meeting, when Ms. Janikowski told complainant "never again to mention [complainant's] sexual orientation on the unit, as some of the employees found it offensive."

16. After the evaluation meeting (§12), complainant said the "next thirty days were hell!" Instead of monitoring complainant's performance and providing guidance, complainant said she "was given alienation and unrelenting harassment."

14. The sole "adverse action" referenced in the discussion section of the Initial Determination was the probationary determination in August of 1998. The sole "conclusion" reached in the Initial Determination was as follows:

There is No Probable Cause to believe that complainant was discriminated against on the basis of her sexual orientation in violation of the Fair Employment Act when her probationary employment as a Resident Care Technician 1 was terminated on August 12, 1998.

15. Complainant filed a written appeal of the Initial Determination of "no probable cause" on January 11, 2001.

16. By a letter dated March 19, 2001, the Commission's hearing examiner directed complainant as follows: "Complainant has until April 5, 2001, to specifically list the alleged conduct she claims constituted harassment. The list should specify the conduct, indicate when it occurred and who engaged in such conduct."

17. In response to this letter, complainant filed on April 10, 2001, a letter dated March 27, 2001, which summarized her harassment claim in seven numbered paragraphs. These paragraphs were cross referenced to specific parts of her original complaint. A copy of the complaint was attached to this letter and the specific parts of the complaint that were cross-referenced were underlined and numbered to correspond to the paragraphs in complainant's March 27, 2001, letter

OPINION

Complainant made clear references to harassment in her original complaint, filed on March 2, 1999. It refers to a variety of statements during the July 1, 1998, meeting with Ms. Jankowski (described in ¶1c) as "harassment", she later claimed to a nursing administrator that she was being "harassed" and contended that her hospitalization that preceded her termination was due, in part to the "immense stress from the harassment." Two of the comments that complainant attributed to Ms. Jankowski allegedly referenced complainant's sexual orientation. Complainant also checked off the boxes both for "discipline" and "harassment" under the heading of "[t]he acts of discrimination/retaliation were related to" on the form itself. Furthermore, complainant also referenced harassment in her response to respondent's answer to the complaint. The Commission construes these references as an articulation of a claim of harassment based on sexual orientation.

In the Commission's opinion, the present posture of this case is that the original complaint includes, in addition to the claim that the termination of complainant's probationary employment constituted an unlawful act of discrimination on the basis of sexual orientation in violation of the WFEA, a claim of discriminatory harassment on the basis of sexual orientation, in violation of the WFEA, with regard to conditions of employment. Because the complaint alleges issues of discrimination with regard to both the probationary termination and to hostile environment harassment, establishing issues for hearing relating to both matters does not involve an amendment to the complaint. When the investigator analyzed this case for the purpose of preparing an initial determination, she apparently considered the allegations of harassment as evidence of a discriminatory atmosphere attributable to management rather than as a separate claim, and did not address the harassment claim as such.

The December 12, 2000, initial determination does not specifically address the alleged harassment as a separate claim, although it mentions the alleged harassment at several points in the investigative summary. From a procedural standpoint, when the

initial determination of no probable cause was issued, it had the effect of finding no probable cause with regard to the entirety of the complaint, and complainant's ensuing appeal of that initial determination had the effect of placing her entire complaint before the Commission for determination at the next (current) stage of the process.

Respondent also argues that:

At this late date, after the ID has been issued and a hearing scheduled, the Commission should not allow an expansion of the issue. Such expansion would prejudice the respondent because, until now, the complaint has always centered on the issue of probationary termination. The ability of the respondent to prepare its witnesses for hearing would be harmed when more than two years have passed since the complaint was filed, and over three years will have passed between the probationary termination in 1998 and the hearing in August of this year. The Commission has not allowed an amendment in such situations in other cases. See *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94. Letter to the Commission dated March 15, 2001, p. 1.

The Commission does not agree with respondent's contention regarding prejudice. The complaint itself makes it reasonably clear that complainant was alleging hostile environment harassment. At the very least, if the allegations of harassment are viewed as evidence of bias and/or a pattern of discrimination (as the investigator apparently did), this should have put respondent on notice that these allegations would be part of complainant's case which respondent would have to address at hearing. The *Chelcun* case has little, if any, application to this situation, because that case involved an actual proposed amendment to a complaint that was requested after extensive discovery, and the proposed amendment would have added several new acts of alleged discrimination and a new basis of discrimination.

Respondent also argues that other than the probationary termination, none of the actions constitute an adverse action. Respondent's contention amounts to a motion to dismiss for failure to state a claim with respect to all matters alleged in the complaint except for the probationary termination. In resolving such a motion, the Commission applies the following standard:

The general rules for deciding motions of this nature were discussed in *Phillips v. DHSS*, 87-0128-PC-ER, 3/15/89; affirmed, *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N. W. 2d 121 (Ct. App. 1992); as follows:

"For the purpose of testing whether a claim has been stated the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must be eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if 'it is quite clear that under no circumstances can the plaintiff recover.' The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." (citations omitted)

Additionally, since this matter is an administrative proceeding, pleading requirements are less stringent than in a judicial proceeding, and pleadings should be even more liberally construed than in a judicial proceeding. See *Oakley v. Commissioner of Securities*, 78-0066-PC (10/10/78); 73A CJS Public Administrative Law and Procedure §122. *Association of Career Executives (ACE) v. DOA*, 1/12/93.¹

While an "adverse action" is an element of a prima facie case of an allegation of disparate treatment under the Fair Employment Act, in a harassment claim the harassment itself is the adverse action. In *Al Yasiri v. UW (Platteville)*, 98-0110, 0129-PC-ER, 7/10/01, the Commission discussed the conduct encompassed by the hostile environment analysis. The Commission noted that many factors are pertinent when deter-

¹ See also *Loomis v. Wisconsin Personnel Commission*, 179 Wis. 2d 25, 30, 179 Wis. 2d 25 (Ct. App. 1993).

mining whether conduct constitutes actionable harassment and quoted with approval the following language from *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806-07:

[S]exual harassment is actionable under Title VII only when it is sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' *Meritor Sav. Bank*, 477 U.S. at 67, 106 S. Ct. at 2405, quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). Whether the harassment rises to this level turns on a constellation of factors that include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283, 141 L.Ed.2d 662 (1998). We also assess the impact of the harassment upon the plaintiff's work environment both objectively and subjectively. The work environment cannot be described as "hostile" for purposes of Title VII unless a reasonable person would find it offensive and the plaintiff actually perceived it as such. *Faragher*, 118 S. Ct. at 2283, citing *Harris*, 510 U. W. at 21-22, 114 S. Ct. 370-71.

The question of whether the alleged conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment is a different standard than that of whether a discrete act by the employer constitutes an "adverse action." Therefore, while an adverse evaluation, standing alone, is not considered an adverse action, *see, e. g., Lutze v. DOT*, 97-0191-PC-ER, 7/28/99, in this case it is part of a combination of actions that complainant asserts amounted to harassment, and can not be considered in the abstract or in isolation. For example, complainant alleges that "malicious and unsubstantiated comments were made about my character," complainant's March 27, 2001 (filed April 10, 2001), letter to the Commission, with attachments:

Some of the most hurtful things on this review were those things that were an attack on my personal character. It was stated on the written review that that I was a poor role model for the patients, that I had bad personal and dental hygiene, body odor, oily hair, etc. But the[re were] additional statements that were not part of the written report. Joni stated that it was reported to her by an unnamed person that I had left a

sanitary pad in the waste can, in the employe restroom, unwrapped.
Attachment to March 27, 2001, letter, p. 2.

In this context and under these circumstances, the Commission will not dismiss either the harassment claim or the aspect of the harassment claim related to the evaluation of complainant's performance for failure to state a claim.

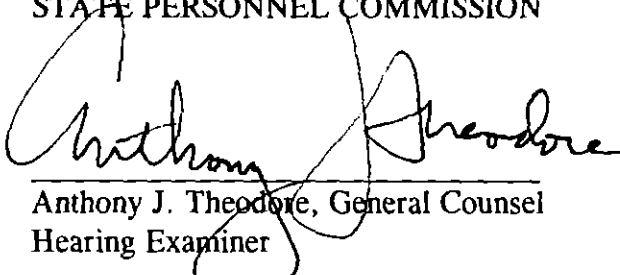
ORDER

Complainant's request to limit the issues in the case to consideration of the claim of discrimination on the basis of sexual orientation with regard to the termination of the complainant's probationary employment, and its motion to dismiss that part of the complaint related to complainant's allegations of harassment, are denied. The issues for hearing will be as follows:

1. Whether respondent discriminated against complainant based on her sexual orientation when it terminated her probationary employment as a Resident Care Technician 1 on August 12, 1998.
2. Whether respondent discriminated against complainant based on her sexual orientation with regard to the alleged harassment set forth in her letter to the Commission dated March 27, 2001, and received April 10, 2001, and in those portions of the attached copy of the text of the original complaint (filed March 2, 1999) which are referred to in that letter.

Dated: July 27, 2001

STATE PERSONNEL COMMISSION


Anthony J. Theodore, General Counsel
Hearing Examiner

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