

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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DONNA E. DAVIS,	:	
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Complainant,	:	Case CVII
	:	No. 21873 PP(S)-46
vs.	:	Decision No. 15699-A
	:	
STATE OF WISCONSIN,	:	
DEPARTMENT OF ADMINISTRATION,	:	
and its EMPLOYMENT RELATIONS SECTION,	:	
	:	
Respondent.	:	
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Appearances:

Lawton and Cates, Attorneys at Law, by Messrs. Richard V. Graylow and John H. Bowers, appearing on behalf of the Complainant.  
 State of Wisconsin, Department of Administration, by Mr. Lionel L. Crowley, Attorney at Law, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on July 19, 1977 alleging that the above-named Respondent had committed unfair labor practices within the meaning of Section 111.84(1)(a) and (c) of the State Employment Labor Relations Act (SELRA); and the Commission having appointed Duane McCrary, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held before the Examiner in Madison, Wisconsin on May 22, 1979; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the State of Wisconsin, by its agency, the Department of Health and Social Services, Division of Mental Hygiene, herein Respondent, is an employer and that at all times material herein, Dr. Richard Scheerenberger functioned as Superintendent of Respondent's facility known as Central Wisconsin Colony located in Madison, Wisconsin; that Mr. Brian Fancher was employed as personnel manager at Central Wisconsin Colony; that Mr. Mark Hoover was employed by the Division of Mental Hygiene, as personnel manager and functioned as Respondent's labor relations representative; and all three individuals functioned as Respondent's agents.

2. That Donna E. Davis, herein Complainant, was employed as a Psychologist I in the psychology department at Respondent's facility known as Central Wisconsin Colony, Madison, Wisconsin; that effective September 23, 1971 Complaint has assigned the Acting Directorship of the Psychology Department at Central Wisconsin Colony; that on or about October 27, 1975 the Complainant filed along with other psychologists

a departmental grievance which raised certain questions about specific reorganizational decisions made by Dr. Scheerenberger as they related to the Psychology Department; that the October, 1975 grievance was denied, and subsequently appealed to the Personnel Board, State of Wisconsin where on or about May 18, 1978, it was dismissed due to lack of subject matter jurisdiction.

3. That prior to December 6, 1976 the position held by the Complainant was announced as a permanent position carrying the classification of Psychologist Supervisor I - Doctorate (Management); that both the Complainant and Ms. Agnes Song were certified by the Respondent as being eligible for the Psychologist Supervisor I - Doctorate (Management) position; that by letter dated December 6, 1976 from Mr. Fancher, Ms. Song was notified of her selection as Psychologist Supervisor I - Doctorate (Management); that by letter dated December 6, 1976, from Fancher the Complainant was informed that her application for the above-mentioned position had not been accepted; and that on August 26, 1977, the Complainant resigned here employment.

4. That in conversation with Ms. Helen Dicks, Chief Steward, W.S.E.U in early 1976, Mr. Mark Hoover stated that the Complainant and the other psychologists employed at Central Wisconsin Colony were viewed as being "disruptive" and being "troublemakers"; that during this same conversation Mr. Hoover related that Dr. Scheerenberger felt that the psychologists employed at Central Wisconsin Colony were a "bad influence"; that during this same conversation Mr. Hoover informed Ms. Dicks that the Complainant could not be promoted to the permanent position because of management's feelings about her; that in April, 1976 the Complainant had a conversation with Dr. Scheerenberger wherein he questioned her supervisory ability because of the departmental grievance; that Dr. Scheerenberger told the Complainant that she failed to identify with management and that she was acting in the capacity of a "chief steward".

5. That the statements referred to in Findings of Fact Number 4 demonstrate that Respondent's failure to select the Complainant for the position of Psychologist Supervisor I - Doctorate (Management) on December 6, 1976 was due, at least in part, to animus toward Complainant because of her lawful concerted activity on behalf of herself and other psychologists employed at Central Wisconsin Colony.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

#### CONCLUSIONS OF LAW

1. That at all times material herein, the Complainant was an "employee" as that term is defined in Section 111.81(15) of the State Employment Labor Relations Act. 1/

2. That when the Complainant, along with other psychologists, filed a departmental grievance on or about October 27, 1975, she was engaged in lawful concerted activity.

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1/ Respondent in its Answer to the instant complaint admitted that at all times material Complainant was an employe under SELRA.

3. That Respondent's failure to select the Complainant for the Psychologist Supervisor I - Doctorate (Management) position on December 6, 1976, was due, at least, in part to animus toward Complainant because of her lawful concerted activity on behalf of herself and other psychologists employed at Central Wisconsin Colony and therefore constituted a violation of Section 111.84(1)(c) and (a) of the State Employment Labor Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that Respondent, State of Wisconsin, Department of Health and Social Services, Division of Mental Hygiene, its officers and agents shall immediately:

1. Cease and desist from denying employes promotional opportunities because of the exercise of their right under Section 111.82 Wisconsin Statutes to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, or in any other manner discriminating against such employes because of their lawful concerted activities.

2. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights under Section 111.82 Wisconsin Statutes.

3. Take the following affirmative action which the Examiner finds will effectuate the purposes of the State Employment Labor Relations Act.

a) Immediately offer the Complainant the position of Psychologist Supervisor I - Doctorate (Management) or a substantially similar position with all seniority, benefits or other rights and privileges retroactive to the date Complainant should have been selected for the Psychologist Supervisor I - Doctorate (Management) position to the date of her resignation and resuming on the date of Complainant's appointment to the position however, said appointment shall in no case be made later than twenty (20) days from the date of the Examiner's Order and make the Complainant whole for any loss of pay she may have suffered by reason of the prohibited practice, by payment to her of a sum of money which she would have received had she been appointed to the Psychologist Supervisor I - Doctorate (Management) position less any amount earned through her employment with the Respondent up to and including the date of Complainant's resignation.

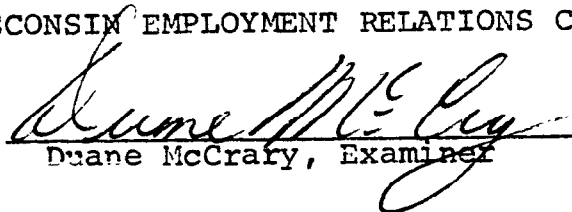
b) Notify all employes, by posting in conspicuous places in its offices where notices to employes are usually posted, copies of the notice attached hereto and marked "Appendix A". Said notice shall be signed by the Superintendent of Central Wisconsin Colony and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 5th day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY

  
Duane McCrary, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Labor Relations Act, we hereby notify our employes that:

1. WE WILL NOT discriminate against any employe by denying employes promotional opportunities due to the exercise of their right under Section 111.82 Wisconsin Statutes to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, or in any other manner discriminating against employes because of their lawful concerted activities.

2. WE WILL offer to Donna E. Davis, the position of Psychologist Supervisor I - Doctorate (Management) or a substantially similar position with all seniority, benefits or other rights or privileges retroactive to the date Ms. Davis should have been selected to the Psychologist Supervisor I - Doctorate (Management) position to the date of her resignation and resuming on the date of her appointment to the position; and pay to Ms. Davis a sum of money which she would have received had she been appointed to the Psychologist Supervisor I - Doctorate (Management) position less any amount earned through her employment with the Respondent up to and including the date of her resignation.

Dated this      day of                      , 1980.

By

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Dr. Richard Scheerenberger  
Superintendent, Central Wisconsin Colony

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

Essentially, Complainant alleges that she was not selected for the Psychologist Supervisor I - Doctorate (Management) position because she, along with other psychologists filed the October, 1975 departmental grievance which challenged Respondent's reorganization as it affected the Psychology Department at Central Wisconsin Colony in violation of Section 111.84(1)(a) and (c) of the State Employment Labor Relations Act (SELRA). Respondent avers that Complainant was not a member of any union nor was she a bargaining unit member and therefore the filing of the departmental grievance in October, 1975 is not activity protected under SELRA. Further, Respondent asserts that it had a right to and did consider the departmental grievance filed by the Complainant when it made its decision regarding the Psychologist Supervisor I position because it was a statement which indicated the extent of her loyalty to management. Respondent believed that the departmental grievance indicated that the Complainant would not work effectively with the management hierarchy and the Respondent could properly consider the Complainant's agreement with management's philosophy in filling a supervisory position. Lastly, Respondent at hearing moved to dismiss the complaint for an alleged failure to state a cause of action.

Section 111.84(1)(c) of SELRA states, in pertinent part, that: "It is an unfair labor practice for an employer ... to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms on candidates of employment."

The Commission has ruled that an employe may not be discharged or otherwise discriminated against when one of the motivating factors for the employer's action is the employe's lawful concerted activity, no matter how many other valid reasons exist for such employer action. <sup>2/</sup> Further, labor organization involvement is not a prerequisite. <sup>3/</sup> However, the Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that Respondent's failure to promote her to the permanent position was based, at least in part on the Complainant's lawful concerted activity. <sup>4/</sup> To prevail, Complainant must therefore establish that Complainant was engaged in lawful concerted activity and that Respondent had knowledge of that fact; that Respondent bore animus against the Complainant because of such activity and that finally, Respondent's stated reasons for its actions taken visavis Complainant were pretextual in nature, and that one of the reasons for Respondent's actions was based on the fact that Complainant was engaged in lawful concerted activity. <sup>5/</sup> Further, all though the instant complaint turns upon state employe rights under Sections 111.82 and 111.84 of SELRA, the statutory expressions of employe rights under Section 111.70(2) of the Municipal Employment

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<sup>2/</sup> Muskego Norway School District No. 9 (7247) 8/65; aff. 35 Wis. 2d 540 6/67; Hillview Nursing Home (14704 - A, B) 7/78.

<sup>3/</sup> Juneau County (12593-B) 1/77.

<sup>4/</sup> Hillview, Supra.

<sup>5/</sup> City of Wisconsin Dells (11646) 3/73; Madison Joint School District No. 8 (13794-A) 5/76.

Relations Act (MERA) and Section 111.82 of the State Employment Labor Relations Act (SELRA) are virtually the same. Thus, the Examiner concludes that the Commission's determination with respect to employe rights under MERA can reasonably be extended to the case at hand. 6/

Federal courts have interpreted Section 7 of the National Labor Relations Act as giving employes the right to engage in concerted activities for their mutual aid and protection even through no union activity be involved or collective bargaining be contemplated. N.L.R.B. v. Phoenix Mutual Life Ins., 167 F2d 983 (7th Cir. 1948). Further, the Court ruled that employes who engaged in non union concerted activities may not be discharged for engaging in the activity. In addition, the United States Supreme Court in Eastex Inc. v. N.L.R.B. 98 SCT 2505 (1978) recognized that the "mutual aid or protection" clause in Section 7 of the National Labor Relations Act protects employes when they seek to improve working conditions through resort to administrative and judicial forums. Lastly, The Commission in Juneau County, supra, ruled, inter alia, that circulating a petition aimed at improving working conditions constituted the exercise of the right, under MERA to engage in concerted activity for mutual aid or protection with respect to wages and conditions of employment and that to discharge employes because they were engaged in the activity, i.e., circulating the petition, was a violation of Section 111.70(3)(a)3 and (1) of MERA. It construed the ban against discrimination to include discrimination with respect to the exercise of any right protected by MERA. The Commission's construction in Juneau County, supra, was premised upon the belief that the Legislature intended to protect any concerted activity which related to wages, hours, conditions of employment and other mutual aid and protection of employes because such concerted activity is incipient to union activity.

Here, the departmental grievance filed by the Complainant and other Psychologists illustrated their concern that as a result of the re-organization of Central Wisconsin Colony, that professional psychologists would apparently not be supervised by employes trained in their own discipline. An examination of the document shows that the grievance raised questions about supervision, probation, the evaluation of psychologists and work load. Thus, the departmental grievance was aimed at improving the working conditions of the psychologists. Consequently, the Examiner concludes that the Complainant and the other psychologists were engaged in activity protected by SELRA when they filed the departmental grievance in October, 1975. Thus, it is clear that the instant complaint adequately states a cause of action and Respondent's motion to dismiss is denied.

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6/ The Complainant may have a cause of action before the Personnel Commission pursuant to Sections 230.44 and 230.45 Wisconsin Statutes. However, an examination of those sections discloses no provisions prohibiting retaliation as contained in the equal rights statutes. See Section 111.32(5)(g)2 Wisconsin Statutes which makes it unlawful sex discrimination for an employer to discharge or otherwise discriminate against a female employe because she has filed a complaint alleging sex discrimination or, testified or assisted in any proceeding pursuant to the filing of the complaint. Nor is there a statute prohibiting retaliation for filing an appeal with the Personnel Commission. Hence, whether the Complainant was not selected for the permanent position because she filed grievances and whether the decision not to promote her violated Section 111.82 Wisconsin Statutes is a determination which may be made by the Wisconsin Employment Relations Commission.

Certainly, the Respondent's knowledge of the Complainant's activity may be inferred from the fact that Respondent answered the departmental grievance, by denying it at all three levels. Further, the Examiner is satisfied that Respondent bore animus against the Complainant because she filed the departmental grievance. Ms. Dicks, Chief Steward, W.S.E.U. at Central Colony in 1976 testified without contradiction that in early 1976 she had conversations with Mr. Mark Hoover, Respondent's labor relations representative, about the Complainant. Mr. Hoover explained to Ms. Dicks that the Complainant and the other psychologists were viewed as "troublemakers" and were disruptive. Further, Mr. Hoover related that Dr. Scheerenberger felt that the psychologists at Central Wisconsin Colony were a "bad influence". While there was no elaboration given, the Examiner concludes that this statement illustrates Dr. Scheerenberger's animus toward the Complainant and it is reasonable to assume that he felt the Complainant to be a "bad influence" on other employes at Central Wisconsin Colony. Moreover, this statement evinces Dr. Scheerenberger's intent to discourage those employes at Central Wisconsin Colony who would be inclined to file grievances which challenge decisions of management. Lastly, Mr. Hoover informed Ms. Dicks that the Complainant could not be promoted to the permanent position because of management's feelings about her.

The Complainant testified that in April, 1976 she had a conversation with Dr. Scheerenberger about a performance evaluation wherein Dr. Scheerenberger questioned her supervisory ability because of the departmental grievance. Moreover, Dr. Scheerenberger indicated to her that with respect to the permanent position, it would be the first time in many years that he had not put a qualified "in house" person in the position, but he felt that he had to put someone in this position who was supportive of management. Dr. Scheerenberger testified that he told the Complainant that she failed to identify with management and that she was acting in the capacity of a "chief steward." He further testified that people "downtown" viewed the Central Wisconsin Colony psychologists as a small group of self-serving individuals.

Both the Complainant and Ms. Song were certified as being eligible for selection to the Psychologist Supervisor I position by the Bureau of Personnel, Department of Administration. However, Dr. Scheerenberger indicated to Mr. Fancher that Ms. Song was better qualified for the position. Respondent offered no evidence indicating any of the reasons why Ms. Song was better qualified for the position. For example, there is nothing in the record concerning Ms. Song's professional qualifications or her work experience which would lead to the conclusion that Ms. Song was, in fact, better qualified for the Psychologist Supervisor I position. The absence of evidence in the record demonstrating Ms. Song's superior qualifications for the position coupled with the presence of evidence in the record showing that Respondent bore animus against the Complainant for her concerted activity, makes it clear to the Examiner that Complainant's concerted activity was, at least, part of the reason why she was not selected for the Psychologist Supervisor I position. Thus, Respondent's failure to select the Complainant for the position was an attempt to discourage Complainant's lawful concerted activity. Further, the inherent and foreseeable effect of failing to promote an employe for engaging in lawful concerted activity is to discourage that activity. Thus, Complainant has established by a clear and satisfactory preponderance of the evidence that Respondent committed a violation of Section 111.84(1)(c) and (a) of SELRA. Moreover, unlawful discrimination also constitutes a Section 111.84(1)(a) violation in that the unlawful discrimination interferes with the right to collectively bargain and the right to engage in lawful concerted activities.



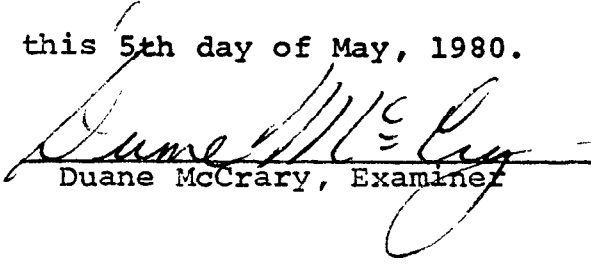
The Commission's traditional remedy in cases where an employe has been discriminated against for engaging in protected concerted activity is to place the employe in the position he/she would have occupied but for the unlawful discrimination. 7/ The Commission fashions a remedy, which may include reinstatement, promotion, back pay, posting of notices or any other remedies designed to effectuate the purposes of SELRA. The National Labor Relations Board in Mooney Aircraft v. Lodge 725, International Association of Machinists 156 N.L.R.B. 326 (1965) directed that an employe be reimbursed for wages lost because of discrimination at the rate of a higher paid job to which the Board found he would have been promoted absent discrimination. However, a distinguishing factor between the Mooney Aircraft case and the instant complaint is that here the discriminatee retained her employe status after being discriminated against while in Mooney Aircraft supra, the discriminatee lost his employe status pursuant to the unlawful discrimination. Consequently, the N.L.R.B. back dated the discriminatee's back pay to the date he would have been promoted absent discrimination and ordered the promotion. However, the instant Complainant resigned her employment in August, 1977.

The protections contained in SELRA are only extended to "employees" as that term is defined in Section 111.81(15) Wisconsin Statutes and consequently, once an employe resigns their employment, that individual loses the protection of SELRA. Absent a causal connection between Respondent's unlawful discrimination and the Complainant's resignation, the Examiner will not extend Respondent's back pay liability beyond the date of Complainant's resignation because at that time, she lost the protection of SELRA. Here, there is no such causal connection demonstrated in the record and the Examiner has fashioned an appropriate remedy.

Accordingly, the Examiner has ordered the Respondent to offer the grievant the Psychologist Supervisor I position or a substantially similar position with all seniority, benefits or other rights and privileges retroactive to the date Complainant should have been selected for the Psychologist Supervisor I (Management) position to the date of her resignation and resuming on the date of Complainant's appointment to the position, however, said appointment shall be made no later than twenty (20) days from the date of the Examiner's Order. Similarly, the Examiner has ordered Respondent to pay to the grievant a sum of money which she would have received had she been appointed to the Psychologist Supervisor I - Doctorate (Management) position less any amount earned through her employment with the Respondent up to and including the date of Complainant's resignation.

Dated at Madison, Wisconsin this 5th day of May, 1980.

By

  
Duane McCrary, Examiner

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7/ Winnebago County (16930-A) 8/79.