STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BARBARA FINKELSON, Complainant,

vs.

CLARK COUNTY, Respondent.

Case 117
No. 61001
MP-3805

Decision No. 30361-B

Appearances:

Mr. Brian G. Formella, Anderson, O'Brien, Bertz, Skrenes & Golla, Attorneys at Law, 1257 Main Street, P.O. Box 228, Stevens Point, Wisconsin 54481-0228, appearing on behalf of Barbara Finkelson.

Ms. Victoria L. Seltun, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Clark County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On May 20, 2003, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order concluding that Respondent County had not terminated Complainant Finkelson's employment out of hostility to her exercise of her rights under Sec. 111.70(2), Stats., and thus had not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats. However, the Examiner also concluded that "County employees could reasonably perceive Complainant's termination on January 16, 2002, as retaliation for her lawful, concerted activity," which "has a reasonable tendency to interfere in employee exercise of rights set forth in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats."

As a remedy for the violation of Sec. 111.70(3)(a)1, Stats., the Examiner ordered the County to cleanse Ms. Finkelson's personnel record of references to her having been involuntarily terminated, to ensure that future employment references would be consistent with the change in her records, to make Ms. Finkelson "whole" by reimbursing her for the attorney's fees and costs she incurred in processing the complaint through the evidentiary hearing on February 12, 2003, plus interest, and to post a Notice to Courthouse employees.

On June 9, 2003, Ms. Finkelson filed a timely petition for review of the Examiner's decision with the Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., followed by a brief in support of her petition for review on July 1, 2003. The County filed a brief in opposition to the petition for review on July 21, 2003 and Ms. Finkelson filed a reply brief on August 11, 2003.

On September 12, 2003, the Commission heard Examiner McLaughlin's impressions of the demeanor of witnesses during hearing.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 - 10 are affirmed.

B. The Examiner's Finding of Fact 11 is modified as follows:

> 11. Ms. Schultz and Complainant discussed the differences in the wage rate entries between the Ratification Document and the Spreadsheet as those differences affected employees in the Child Support Agency as well as other departments, including the Bus Drivers. Ms. Johnson brought Ms. Petkovsek to the Child Support Agency to discuss the differences between the documents. Ms. Schultz, Ms. Finkelson, Ms. Petkovsek and Ms. Johnson met at roughly 1:00 p.m. on the afternoon of January 11, 2002. Ms. Petkovsek attempted to explain the assumptions underlying the differences between the documents and attempted to answer questions put forward by Ms. Schultz and Ms. Finkelson. Ms. Finkelson and Ms. Schultz were convinced that the differences were mistakes at best and possibly misrepresentations of fact. Ms. Finkelson stated to Ms. Petkovsek that the County should be held to a higher standard as a public entity, and that the County's failure to rectify the mistake was wrong. Ms. Petkovsek did not acknowledge that mistakes had been made and did not offer to take any corrective action. She believed that Ms. Schultz and Ms. Finkelson misunderstood the costing documents and that the problem was to address their misunderstanding. Ms. Finkelson believed Ms. Schultz was more upset than Ms. Finkelson was about the situation but that Ms. Schultz's personality was less suited to confrontation. Hence, Ms. Finkelson took it upon herself to be

the main spokesperson and was quite forceful in expressing her view. At one point during the meeting, she rose up slightly out of her chair and placed her hands on the table to emphasize her words. The two employees left the meeting unconvinced by Ms. Petkovsek's explanation.

Ms. Petkovsek was offended by Ms. Finkelson's manner during this meeting but Ms. Finkelson was not violent or threatening.

After leaving the meeting, Ms. Schultz and Ms. Finkelson spoke. Ms. Schultz stated she would call the Union's Business Representative sometime during the weekend to discuss the matter.

C. The Examiner's Findings of Fact 12 - 16 are affirmed.

D. The Examiner's Finding of Fact 17 is modified as follows:

17. Ms. Johnson had concerns during Ms. Finkelson's probationary period about Ms. Finkelson's overly self-confident attitude. She felt that Ms. Finkelson, as an inexperienced employee, did not ask enough questions about handling her cases; seemed overly assertive at times during staff meetings; on one occasion had been less than forthright about planning a vacation day; and had reacted too assertively when she had been requested to leave an out-of-the-office training meeting in order to secure a supervisor's signature on the registration form. Johnson had noted these concerns in an "evaluation file" that she kept as a memory aid for writing evaluations. She did not consult these notes prior to terminating Ms. Finkelson. Ms. Johnson would not have terminated Ms. Finkelson or extended her probationary period based on any of these concerns. Nor did she have any concerns that Ms. Finkelson could not respond to instruction as of the time of her termination.

After the termination, Ms. Johnson split Ms. Finkelson’s pending caseload in half, assigning one-half to Ms. Schultz and one-half to Ms. Jasmer. Ms. Schultz found no problems with Ms. Finkelson’s processing of the files. Ms. Jasmer, however, alerted Ms. Johnson to what she perceived as problems. Ms. Johnson, after reviewing the files, concluded that Ms. Finkelson had on several occasions undertaken actions not authorized by a pending court order, which Ms. Johnson

considered a serious performance problem. Ms. Johnson believed that Ms. Finkelson had also corresponded with a minor child concerning a parent's support efforts, in a fashion Ms. Johnson believed fundamentally improper.

Prior to suggesting that Ms. Johnson terminate Ms. Finkelson, Ms. Petkovsek did not consult non-supervisory employees concerning Ms. Finkelson's attitude toward work, toward management, or toward other County employees. Prior to terminating Ms. Finkelson, Ms. Johnson also made no such inquiry, except in her periodic discussions with Ms. Finkelson and Ms. Jasmer, concerning Ms. Finkelson's progress during the probation period.

During her probationary period, Ms. Finkelson's wages, hours and conditions of employment were established by the collective bargaining agreement between the Union and the County.

E. The Examiner's Finding of Fact 18 is reversed as follows:

18. Ms. Petkovsek and County Board Chairman Ralph Landini, in suggesting that Ms. Johnson consider taking action against Ms. Finkelson, and Ms. Johnson in terminating Ms. Finkelson, acted at least in part out of hostility to Ms. Finkelson's expressions of concern about the differences between the Ratification Document and the Spreadsheet and the assertive manner in which Ms. Finkelson voiced her concerns about said differences.

F. The Examiner's Conclusions of Law 1 - 3 are affirmed.

G. The Examiner's Conclusion of Law 4 is set aside and the following Conclusion of Law is made:

4. Ms. Finkelson's expressions of concern about the differences between the Ratification Document and the Spreadsheet, including the manner of her expression, were lawful, concerted activities within the meaning of Sec. 111.70(2), Stats.

H. The Examiner's Conclusion of Law 5 is reversed as follows:

> 5. By terminating Ms. Finkelson's employment at least in part out of hostility towards her lawful concerted activity, the County discriminated against Ms. Finkelson in the exercise of her rights guaranteed under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)3, Stats.

I. The following Conclusion of Law is made:

> 6. By the conduct set forth in Conclusion of Law 5, above, the County has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

J. The Examiner's Order is affirmed in part and reversed in part as follows:

ORDER

Respondent Clark County, its officers and agents, shall immediately:

(a) Cease and desist from interfering with, restraining or coercing Barbara Finkelson or any of its employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

(b) Cease and desist from discriminating against Barbara Finkelson or any of its employees for engaging in lawful concerted activity.

(c) Take the following affirmative action which the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Immediately offer to reinstate Barbara Finkelson to her former position on a non-probationary basis and without loss of seniority and benefits. Make Finkelson whole by paying her all wages and benefits she would have earned, less any amount she earned or received that she would not otherwise have received but for her termination, plus interest at the rate of twelve percent (12%) *per annum* 1/ on said amount from the date of her termination to the date she is reinstated or refuses reinstatement.

1/ The applicable interest rate is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency. WILMOT UHS, DEC. NO. 18820-B (WERC, 12/83), CITING ANDERSON V. LIRC, 111 WIS. 2D 245 (1983), and MADISON TEACHERS, INC. V. WERC, 115 WIS.2D 623 (CT. APP. IV 1983).

(2) Expunge from Ms. Finkelson's personnel file(s) any reference to her termination on January 16, 2002.

(3) Notify all of its employees in the Courthouse bargaining unit represented by Clark County Courthouse Employees, Local 546-B, AFSCME, AFL-CIO by posting in conspicuous places where employees are employed copies of the Notice attached hereto and marked "Appendix A". That Notice shall be signed by the Chairperson of the Clark County Board of Supervisors 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 County to insure that said notices are not altered, defaced, or covered by other material.

(4) 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.

Given under our hands and seal at the City of Madison, Wisconsin, this 28th day of November, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.

APPENDIX "A"

NOTICE TO ALL CLARK COUNTY COURTHOUSE EMPLOYEES REPRESENTED BY CLARK COUNTY COURTHOUSE EMPLOYEES, LOCAL 546-B, AFSCME, AFL-CIO

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

1. WE WILL immediately offer to reinstate Barbara Finkelson to her former position in the County Child Support Agency on a non-probationary basis and we will make her whole for all wages and benefits lost as a result of her termination.

2. WE WILL NOT interfere with, restrain or coerce Barbara Finkelson or any other employees in the exercise of their rights pursuant to the Municipal Employment Relations Act.

3. WE WILL NOT discriminate against Barbara Finkelson or any other employees because of their having exercised their rights pursuant to the Municipal Employment Relations Act.

Dated this ________ day of ___________, 2003.

CLARK COUNTY

____
Chairperson
Clark County Board of Supervisors

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

MEMORANDUM ACCOMANYING ORDER

The issue in this case is whether the County violated the Municipal Employment Relations Act (MERA) by terminating Barbara Finkelson's employment at the conclusion of her probationary period based upon her assertive protests over the manner in which the County intended to implement certain wage adjustments affecting the bargaining unit in which Ms. Finkelson was included. For the reasons set forth below, we reverse the Examiner's conclusion that the County did not thereby violate Sec. 111.70(3)(a)3, Stats., and affirm his conclusion that the County thereby violated Sec. 111.70(3)(a)1, Stats., albeit based on a different rationale. To remedy the County's violation of Secs. 111.70(3)(a)1 and 3, Stats., we order reinstatement, back pay, and the posting of a notice to employees.

PROCEDURAL BACKGROUND

On March 15, 2002, Ms. Finkelson filed a complaint of prohibited practice alleging that Clark County (the County) had violated Sec. 111.70(3), Stats., by terminating her employment for asserting rights protected by Sec. 111.70(2), Stats. By order dated May 31, 2002, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Hearing on the matter was set for July 24, 2002, and on June 10, 2002, rescheduled to August 19, 2002. On August 28, 2002, the County filed its answer to the complaint. After several postponements requested by the parties, hearing was held in this matter on January 15, 2003 and February 12, 2003 in Neillsville, Wisconsin. On the first day of hearing, Ms. Finkelson amended her complaint without County objection to specify that the County had violated Secs. 111.70(3)(a)1 and 3, Stats. A transcript of the hearing was filed with the Examiner on March 10, 2003. The parties filed briefs and reply briefs with the Examiner by April 18, 2003 and the Examiner issued his decision on May 20, 2003.

SUMMARY OF THE FACTS

We have largely adopted the Examiner's Findings of Fact, with the key exception of his finding that County officials acted without unlawful hostility in terminating Ms. Finkelson's employment on the last day of her probationary period. As discussed below, we conclude that the County terminated Ms. Finkelson at least in part (indeed, almost exclusively) out of hostility toward her exercise of lawful, concerted activity protected by MERA. We summarize the relevant facts as follows.

On January 17, 2001, Ms. Finkelson began working for the County Child Support Agency as a Child Support Specialist II. As such, she was represented for purposes of collective bargaining by the Clark County Courthouse Employees, an AFSCME local. The applicable collective bargaining agreement, as well as County personnel policies, required Ms. Finkelson to serve a one-year probationary period. The policies allowed the department head to extend the probationary period "for up to an additional six months . . . for substantial

and documented reasons." The policies further provided that "Employees shall be retained based upon the adequacy of their performance. Each employee's job performance shall be evaluated by their department head/supervisor periodically but on no less than an annual basis. . . ."

The County trained Ms. Finkelson by having her observe a co-worker, Gail Jasmer, as she performed her work. After about three weeks, Ms. Finkelson began to process files under the observation of Ms. Jasmer or the other Child Support Specialist, Lori Schultz. After about eight weeks, Ms. Finkelson began processing files on her own. Eventually Ms. Finkelson's caseload reached approximately 300 files, the average number handled by Child Support Specialists.

Ms. Finkelson's supervisor during her employment by the County was Colleen Johnson, the Director of the Child Support Agency. Early on in Ms. Finkelson's employment, she met with Ms. Johnson briefly to check on how her training was progressing. Ms. Johnson did not express any concerns to Ms. Finkelson about job performance during these meetings. Ms. Johnson kept a set of personal notes regarding the employees she supervised in order to help her prepare for evaluations. In Ms. Finkelson's case, Ms. Johnson's notes indicated concerns about Ms. Finkelson's overly assertive attitude displayed, for example, during staff meetings and with regard to an out-of-office training seminar, as well as overconfidence in her ability to handle cases without seeking advice from more experienced colleagues. However, Ms. Johnson did not evaluate Ms. Finkelson during her probationary period and had not consulted the notes before making the decision to terminate her employment. Indeed, Ms. Johnson clearly testified that nothing in those notes, had she consulted them, would have led her to terminate Ms. Finkelson. Nor had any other County officials, including Ms. Petkovsek, raised concerns about Ms. Finkelson's job performance prior to her termination.

Prior to Ms. Finkelson's employment, the County had contracted with Carlson Detmann Associates, LLC (Carlson) for a classification and compensation study affecting many of the employees in the bargaining unit, including the Child Support Specialists. The process included an employee questionnaire, interviews, and ongoing dialogue among Carlson, the County, and the Union, as well as publication of preliminary conclusions subject to an appeal procedure for employees who contested the accuracy of the preliminary job analysis. In late spring 2001, Carlson published its preliminary conclusions, including slotting positions into classifications within pay grades.

On May 11, 2001, all Child Support Specialist II's, including Ms. Finkelson, filed an appeal asserting that Carlson had incorrectly graded their positions. Ms. Johnson supported the appeal and on September 5, 2001, the Carlson study issued its final recommendations, which, inter alia, upgraded the Child Support Specialist II position from where it had been classified in the preliminary report. Thereafter the County and the Union bargained over wage issues related to the classification study and, on December 4, 2001, reached tentative agreement on a wage schedule to cover 2002 and 2003.

Prior to the Union ratification vote regarding the tentative agreement, scheduled for December 10, 2001, the Union distributed a summary of the tentative agreement, which the parties referred to as the Ratification Document. The Ratification Document included a three-page costing-out spreadsheet showing individual wage rates pursuant to the agreed-upon wage scale. However, the reclassification itself, as well as employee changes in position and movement through the steps during the process of reclassification, had complicated the process of costing out the agreement. Hence, the spreadsheet data in the Ratification Document was based upon certain assumptions which were clearly set forth in the document. One of those assumptions was that each employee was placed at the 18 Month Step, although some had not yet actually reached that step. At the December 10, 2001 ratification meeting, Union officials explained this assumption and the result, i.e., that the Spreadsheet did not state the actual wage rate for those employees who had not yet reached the 18 Month Step. Both Ms. Schultz and Ms. Finkelson had not yet reached the 18 Month Step and hence were affected by the assumption. Ms. Schultz attended the ratification meeting. Ms. Finkelson, who as a probationary employee was not a member of the Union, did not attend. The Union ratified the agreement.

After ratification, the County generated actual wage schedules, referred to as the Spreadsheet, for distribution to employees. Ms. Petkovsek knew that some employees would be concerned because the Spreadsheet would show their actual wage rate as lower than the one set forth on the costing-out schedules distributed with the Ratification Document. She asked the department heads, including Ms. Johnson, to provide employees with the Spreadsheet and also to inform them that Ms. Petkovsek would make herself available to answer questions.

On Friday, January 11, 2002, Ms. Johnson gave Ms. Schultz a copy of the Spreadsheet, pointing out and discussing the differences between it and the Ratification Document. Ms. Schultz was upset by the information and thereafter discussed it with Ms. Finkelson. That afternoon, at Ms. Johnson's request, Ms. Petkovsek met with Ms. Schultz, Ms. Finkelson, and Ms. Johnson at the Child Support Agency. During that meeting, Ms. Petkovsek tried to explain the discrepancy between the Spreadsheet and the Ratification Document, but Ms. Finkelson and Ms. Schultz expressed their view that the wage discrepancy was due to a mistake or oversight, and/or that there had been misrepresentation to employees at the ratification meeting. Ms. Finkelson believed Ms. Schultz was especially upset about the situation but was not suited by personality to confrontation. Hence, Ms. Finkelson took it upon herself to be the main spokesperson and was quite forceful and assertive in expressing her view that the County had a special responsibility, as a public entity, to correct the mistake. At one point during the meeting, she rose up slightly out of her chair and placed her hands on the table to emphasize her words. The two employees left the meeting unconvinced by Ms. Petkovsek's explanation. Ms. Petkovsek was offended by Ms. Finkelson's manner during this meeting. However, both Ms. Johnson and Ms. Petkovsek acknowledged that Ms. Finkelson had not been hostile, angry, threatening, or abusive.

Over the weekend, Ms. Schultz consulted Union officials about the discrepancy and on Monday morning, January 14, informed Ms. Finkelson that the Union was unwilling to alter the wage schedule. Later that morning, Union officials met with Ms. Schultz, as well as

Ms. Johnson and two other employees in the Department, to discuss the issue. Ms. Finkelson was also present for a portion of the meeting. The Union officials gave the same explanation as Ms. Petkovsek had given, which was similarly unsatisfying to Ms. Schultz and Ms. Finkelson. At the conclusion of the meeting, the Union officials informed Ms. Schultz that she had a right to file a grievance. Shortly afterwards, Ms. Schultz, Ms. Finkelson, and Ms. Jasmer met to discuss the possibility of a group grievance and Ms. Finkelson advised Ms. Schultz that, if the decision were hers (Finkelson's), she would file a grievance.

That same Monday evening, Ms. Finkelson telephoned Charles Rueth, the Vice Chairman of the County Board of Supervisors, with whom she was acquainted. She insisted in this conversation that the Spreadsheet was wrong and that the County and the Union were wrongdoers in implementing it. Mr. Rueth examined the two documents during this conversation and was also unable to reconcile them. Sometime between that conversation and the end of the day on Wednesday, January 16, 2002, Mr. Rueth discussed the issue with Ms. Petkovsek and then took no further action.

On Wednesday morning, January 16, 2002, Ms. Finkelson discussed the issue with Jill Opelt, another County employee, and later that morning shared a copy of the Spreadsheet with her. Ms. Finkelson, Ms. Opelt, Ms. Jasmer and Ms. Schultz reviewed the Spreadsheet and carried on the discussion during their morning break. Ms. Opelt also brought two other employees into the discussion, which lasted about 15 minutes.

Wednesday, January 16, 2002, was also the last day of Ms. Finkelson's probationary period. At some point during that day, Ms. Johnson was called into a meeting with Ms. Petkovsek and Ralph Landini, Chairman of the County Board of Supervisors, about whether to terminate Ms. Finkelson at the conclusion of her probationary period. While stating that the decision was Ms. Johnson's, Ms. Petkovsek and Mr. Landini recommended that Ms. Johnson take action against Ms. Finkelson because of her attitude and behavior during the October 14 meeting about the Spreadsheet. Ms. Petkovsek had found Ms. Finkelson "condescending" (Tr. Vol. II at 60) and "disrespectful" (Tr. Vol. II at 92) in expressing her view that the County was wrong about the wage rates. At about 15 minutes before the close of the work day, Ms. Johnson handed Ms. Finkelson a letter terminating her employment immediately, unless the Union would agree to extend her probation. Prior to receiving this letter, Ms. Finkelson had received no notice that her employment was in jeopardy. The Union's executive board met the next day and decided not to agree to extend Ms. Finkelson's probation. Hence, January 16, 2002, was Ms. Finkelson's last day of work for the County.

DISCUSSION

Violation of Sec. 111.70(3)(a)3

Ms. Finkelson's petition for review does not challenge the Examiner's conclusion that the County did not act out of unlawful hostility in terminating her employment and therefore

did not violate Sec. 111.70(3)(a)3, Stats. Rather, the petition focuses upon the alleged inadequacy of the Examiner's remedy for the violation he found of Sec. 111.70 (3)(a)1, Stats. However, it is well settled that a petition for review opens the entire Examiner decision for affirmation, modification or reversal. See Secs. 111.07(5) and 111.70(4)(a), Stats.; TRANS AMERICA INSURANCE CO. V. DILHR DEPARTMENT, 54 WIS.2D 252 (1971); STATE V. INDUSTRIAL COMMISSION, 233 WIS. 461 (1940); GREEN COUNTY, DEC. NO. 26798-B (WERC, 7/92). Accordingly, we have reviewed all elements of the Examiner's decision de novo and we hold that the County terminated Ms. Finkelson's employment at least in part out of hostility to her protected activity in protesting the Spreadsheet. 2/

In MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967), and again in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985), the Wisconsin Supreme Court affirmed that a violation of Sec. 111.70(3)(a)3, Stats., is to be found where the complaining party establishes the following four elements: (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity; (3) that the municipal employer was hostile to the lawful concerted activity; and (4) that the municipal employer took action against the municipal employee based at least in part upon such hostility.

2/ As discussed in the following section, we believe that retaliation cases like the present one are appropriately decided under a Sec. 111.70(3)(a)3 type analysis even as to alleged independent violations of Section (3)(a)1 and we depart from the Examiner's rationale on that issue.

As the Examiner correctly held, the first element is satisfied in this case. In protesting what she viewed as a discrepancy between the wages displayed on the Spreadsheet and the wages displayed on the Ratification Document, Ms. Finkelson was acting in pursuit of traditional employee economic interests on behalf of and in concert with other employees, in particular Ms. Schultz. Concerted activity need not be associated with a union, as such, or coincide with a union's point of view in order to have a purpose of "mutual aid or protection" within the ambit of Sec. 111.70(2), Stats. CITY OF OSHKOSH, DEC. NO. 28971-A (MAWHINNEY, 8/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28971-B (WERC, 9/97); SCHOOL DISTRICT OF NEKOOSA, DEC. NO. 25026-A (GRATZ, 5/88), AFF'D BY OPERATION OF LAW, DEC. NO. 25026-B (WERC, 6/88).

As to the question of whether Ms. Finkelson's concerted activity was protected, the Examiner correctly noted that concerted activity can go beyond the pale of statutory protection in some circumstances. Violent or threatening behavior are examples of concerted activity that will likely lose statutory protection. However, the rights established by Section 2 of MERA are often exercised in tense, chilly, or hostile atmospheres, because by its very nature such activity involves challenging the employer's authority. We agree with the Examiner that, while Ms. Finkelson's conduct was vocal (perhaps even "condescending" and "disrespectful" as County officials saw it) it remained within the law's protection. 3/

3/ The National Labor Relations Board (NLRB) recently came to the same conclusion in a context very similar to the present one. SEE UNION CARBIDE CORP., 331 NLRB NO. 54 (2000), ENF'D, 2001 U.S. APP. LEXIS 26594 (4TH CIR. 2001) (unpublished decision) (a probationary employee repeatedly insisted that his starting date be determined in a particular way, so that he would be entitled to a certain holiday; the Board held that his activity, which included calling a supervisor a "fucking liar," was "at most rude and disrespectful" and constituted protected activity).

More troubling as to the protected nature of the concerted activity is the potential for Ms. Finkelson's protest to be viewed as inviting the employer to engage in "individual bargaining" in derogation of the rights of the Union as exclusive bargaining representative. The Examiner discussed this issue in devising his remedy. In a unionized work place, where a subset of employees protests not only the employer's actions but also the union's position on the issue, it is possible for "mutual aid or protection" to collide with the principle of exclusive recognition. SEE, E.G., EMPORIUM CAPWELL CO. V. WESTERN ADDITION COMMUNITY ORGANIZATION, 420 U.S. 50 (1975), a case arising under the National Labor Relations Act (NLRA), holding that a group of minority employees engaged in unprotected activity when, by picketing and boycotting, they sought to compel their employer to bargain with them rather than with the recognized union over the issue of race discrimination in the work place. However, we are mindful that employees could neither organize into a union nor could a union attain the status of exclusive representative without the right to engage in "lawful, concerted activity" granted by Section 2 of MERA. Because Section 2 is MERA's cornerstone, we are inclined to interpret its scope broadly. In the present case, Ms. Finkelson did not ask the County to ignore the Union's contract (the Ratification Document), but instead disagreed, albeit vociferously, with the County's and the Union leadership's interpretation of that document. Her activity did not challenge the Union's exclusive bargaining status or provoke individual bargaining by the County, and thus it remained protected. 4/

4/ We also note that the statutory provision establishing exclusive recognition expressly permits an employer to deal directly with individual employees over grievances, as long as the union is present and the outcome is consistent with the conditions of employment negotiated between the union and the employer. Sec. 111.70(4)(d), Stats.

The second element of the four-pronged analysis under Section (3)(a)3 is not in dispute. The County was well aware of Ms. Finkelson's activity in connection with the Spreadsheet and does not claim otherwise.

The County's central defense lies in the third element of the analysis. The County contends that it bore no hostility to Ms. Finkelson for questioning and challenging the Spreadsheet data, but rather found her manner offensive. The Examiner agreed with the County, reasoning that the County's annoyance at Ms. Finkelson's tenacity was merely

hostility in "an inter-personal relationship," was not intended to "encourage or discourage membership in a labor organization," did not result in any gain to the County, did not extend to Ms. Schultz, who engaged in the same concerted activity, and is countered by the County's willingness to extend Ms. Finkelson's probation. Hence, the Examiner concluded that, "Whatever aggravation is traceable to [Ms. Finkelson's conduct relating to the Ratification Document] is the sole proven source of hostility," which "falls short of the statutory standard." Examiner's decision at 24-25.

We think the Examiner employed an overly narrow and complicated notion of unlawful hostility. Since Ms. Finkelson's persistence regarding the Ratification Document and Spreadsheet was lawful, concerted activity - as the Examiner himself found - then it follows simply and directly that the County's hostility to that activity is illegal hostility. Unlawful discrimination within the proscription of Section (3)(a)3 can involve animus toward a particular employee's protected activity, or toward protected activity of a particular kind, even where the employer has not displayed animus toward the union as such, toward union activity in general, or toward other employees' concerted activity. An employer is not free to exercise his annoyance at one employee's concerted activity simply because the employer has found other concerted activity less annoying. An aggressive grievance officer is likely to incur employer antipathy more readily than a steward who is passive; if the employer terminates the assertive grievance officer for his assertiveness, the employer cannot prevail by demonstrating that he bore no animus towards union stewards in general or towards passive stewards. For that matter, an employer agent who is a present or former union official is not necessarily immune to developing hostility towards the concerted activities of his own employees or subordinates.

In this light, the County has essentially admitted its hostility by explicitly acknowledging that it was unhappy with the manner in which Ms. Finkelson asserted her views regarding the Spreadsheet and Ratification Documents. It could very well be true, as the County states, that it took no offense at the mere fact that Ms. Finkelson disputed the data. We acknowledge that the County responded benignly to Ms. Schultz's participation in the protest and that the County had invited employees to bring forward their questions about the Spreadsheet. However, as discussed above, the manner in which an employee undertakes concerted activity is indivisible from the activity itself and thus is also protected, provided the employee does not exceed the law's liberal parameters. The record reflects that Ms. Finkelson adopted a relatively assertive manner precisely in order to buttress Ms. Schultz's equally heartfelt concern but more reticent manner. Hence, we hold that the County's admitted antipathy toward Ms. Finkelson's demeanor or attitude in carrying out her concerted activity amounts to unlawful animus. 5/

5/ The Examiner noted that the County (Ms. Johnson) attempted to persuade the union to extend Ms. Finkelson's probationary period, a gesture that the Examiner saw as inconsistent with unlawful animus on the part of the County. In our view, however, the County's effort suggests only that its animus was not so vituperative as to preclude continued probationary employment. Further, extending Ms. Finkelson's probationary period had that occurred, would have been adverse action motivated by animus towards Ms. Finkelson's protected activity and would itself have violated Section (3)(a)3. Hence the fact that the County considered a lesser form of adverse action does not undermine our conclusion that the County acted out of unlawful animus towards Ms. Finkelson.

The fourth and final element of a Section (3)(a)3 violation is an established nexus between the unlawful hostility and the adverse action. This element is met easily in the present case. The County has essentially admitted that its displeasure with Ms. Finkelson's conduct regarding the Spreadsheet (or, as the County saw it, her attitude or manner) led it to terminate her employment at the conclusion of her probationary period. Even without this admission, the timing of the termination so closely juxtaposed with the Spreadsheet controversy, together with the admitted lack of prior warning or contemporaneously considered lawful grounds for the termination, would be sufficient to establish the necessary nexus.

Therefore we reverse the Examiner and conclude that the County terminated Ms. Finkelson's employment on January 16, 2002, out of hostility toward her lawful, concerted activity in protesting and questioning the Spreadsheet and Ratification Documents, in violation of Sec. 111.70(3)(a)3, Stats.

Violation of Sec. 111.70(3)(a)1

Because retaliation for lawful, concerted activity inherently discourages other employees from engaging in concerted activity, a violation of Section (3)(a)3 is also a violation of Section (3)(a)1. The Examiner concluded that the County's conduct constituted a violation of Section (3)(a)1, applying the traditional Section (3)(a)1 analysis of whether the employer's action had a reasonable tendency to interfere with protected activity and, if so, whether the employer had valid reasons for its actions.

In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees. If the circumstances demonstrate that the adverse action (e.g., termination, discipline, layoff) was lawfully motivated, we will not find it unlawful under Section (3)(a)1 simply because it could be perceived as retaliatory. To find an independent (3)(a)1 where the discipline was lawfully motivated would constructively establish a higher hurdle for disciplining union activists than for other employees. While we understand that the "valid reasons" portion of the traditional Sec. 111.70(3)(a)1, Stats., analysis can be viewed as sufficient protection against such a result, we think the law is well served by eliminating the potential for a contrary result.

The present situation demonstrates why the traditional (3)(a)1 analysis is problematic in a case that centers on retaliation. As a general rule, probationary employees of the County are not entitled to prior warning or documentation of deficiencies before being terminated. The Examiner, however, while noting that the County had no "duty" in this regard, and despite finding that the County had a lawful motive, nonetheless effectively imposed those requirements on the County in Ms. Finkelson's case, solely because she had engaged openly in the Spreadsheet dispute. Had she not engaged in protected activity, or had she exercised that activity more discreetly, she would not have been entitled to prior warning or documentation of deficiencies. While we understand the Examiner's analytical dilemma, this result seems

anomalous to us and intrudes too deeply into the disciplinary prerogatives of public employers. Moreover, it tends to elicit a potentially confusing and unconventional remedy, as it did in the Examiner's decision in this case.

We do not intend by this discussion to alter or undermine the traditional Section (3)(a)1 analysis, under which the employer's intent is not dispositive. Section (3)(a)1 will still invalidate employer threats, statements, work rules, and other actions that burden or chill lawful concerted activity without a valid countervailing business reason, whether or not the employer acted out of unlawful animus. Nor do we mean to suggest that an employer's actions against employees could never be "inherently destructive" of Section 2 rights within the ERIE RESISTOR doctrine, 6/ or to narrow the circumstances that reflect unlawful animus. We simply hold that the appropriate paradigm for cases involving retaliatory or discriminatory adverse action lies in the four-element framework of Section (3)(a)3. 7/ SEE ALSO, ALLSTATE INSURANCE CO., 332 NLRB NO. 66, 165 LRRM 1293 (2000) (NLRB applied the (a)(3) motive analysis in holding that a written warning violated Section (8)(a)(1) of the NLRA). In such cases, if an employer is found to have acted out of lawful motives, the employer's action will not be found to violate the law.

6/ 373 U.S. 221 (1963).

7/ The NLRB utilizes an (a)(1) analysis, rather than an (a)(3) analysis, where the employer mistakenly but in good faith believed the employee had engaged in misconduct in the course of concerted activity, such as picket line violence. BURNUP & SIMS, 379 U.S. 21 (1964); KNUTH BROTHERS, 229 NLRB 1204 (1977), ENF'D, 584 F.2D 813 (7TH CIR. 1978); SHAMROCK FOODS CO. V. NLRB, 173 LRRM 2454 (D.C. CIR. 2003). Such cases are appropriately handled under a (3)(a)1 paradigm, because the essence of such claims is not retaliation. In such cases the employer's animus is not toward the protected activity (picketing) but rather toward the unprotected misconduct (e.g., picket line violence). If the employee is guilty of the misconduct, there is no violation of law. If the employee is innocent, however, then other employees will reasonably perceive that the employee has been punished for the protected activity. In effect, the BURNUP & SIMS doctrine places an onus upon employers to be correct before they punish employees for misconduct in the course of protected activity. Here, in contrast, the County did not mistakenly believe that Ms. Finkelson had engaged in misconduct; the County knew exactly what Ms. Finkelson had done. Its "mistake" was in thinking that this activity was unprotected. Similarly, the Examiner did not find that Ms. Finkelson had engaged in misconduct, but rather found that unlawful animus had not been established under an (a)3 analysis. He reasoned that, since employees may have gotten the wrong impression, the employer nonetheless should be liable under (3)(a)1. We disagree with the Examiner's analysis. In our view, where a mistake is not the employer's mistake, but lies in the misperceptions of employees, the purposes of the law are not served by holding the employer liable.

Therefore, we affirm the Examiner's conclusion that the County independently violated Sec. 111.70 (3)(a)1, Stats., but do so based on the strength of our Sec. 111.70(3)(a)3 analysis.

REMEDY

The standard remedy for violations of Section (3)(a)3 is an order that the employer offer immediate reinstatement to the employee and provide back pay from the date of the unlawful termination until the date of reinstatement or the date the reinstatement offer is declined), offset by interim earnings and unemployment compensation, if any. In this case, Ms. Finkelson was terminated 15 minutes before the conclusion of her probationary period without any contemporaneously stated legitimate reasons for that termination. It is clear that but for her lawful concerted activity in connection with the Spreadsheet, she would have completed probation successfully and entered non-probationary status as of January 17, 2002. Hence, we order the County to offer her reinstatement to non-probationary status and provide her with back pay from January 17, 2002 until she is reinstated or declines reinstatement, with appropriate offsets.

Both parties have sought modifications to the standard remedy. The County argued to the Examiner that Ms. Finkelson had engaged in serious job-related misconduct during her employment, which the County did not discover until afterwards. On the strength of such "after-acquired evidence" of misconduct, the County contends that reinstatement is inappropriate and back pay should be curtailed. Ms. Finkelson, for her part, seeks "front pay" in lieu of reinstatement, attorneys fees, and costs.

In recent years, it has become increasingly common in employment discrimination cases to limit the remedies of reinstatement and back pay where, subsequent to terminating the employee, the employer discovers misconduct "of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883 (1996) (emphasis added) (a successful age discrimination plaintiff was refused reinstatement because the employer subsequently discovered that she had violated confidentiality prior to her discharge). The NLRB has also indicated a willingness to consider such a limitation of remedies in cases involving anti-union discrimination. See, e.g., Berkshire Farm Ctr., 333 NLRB 367, 166 LRRM 1243, 1244 (2001), and cases cited therein. The Commission, however, has not previously considered the effect of such "after-acquired evidence" in determining whether to limit reinstatement or back pay. In this case and in another decision issued today, Village of Sturtevant, Dec. No. 30378-B, we decide not to adopt such a limitation of remedies.

In Mojave Elec. Coop., 327 NLRB 13, 18, 163 LRRM 1288 (1998), where the NLRB affirmed the Administrative Law Judge's decision not to limit reinstatement and back pay based upon "after-acquired evidence," the ALJ had commented as follows: "In light of my findings above, that Respondent harbors animus and discriminatory intent toward [an employee] and unionism, I have deemed it appropriate to examine such evidence with great care, and with no small amount of suspicion." Similarly, we note the difficulty of untangling an employer's original unlawful motive from the employer's subsequent assertions about how it would have handled alleged misconduct if it had never unlawfully terminated the employee in

the first place. Inevitably, it seems, such determinations would depend upon an unacceptable measure of speculation. To cut off back pay at a specific point in time would require us to determine a date upon which the misconduct would likely have been discovered and to evaluate the employer's likely state of mind at that point in time independent of previous unlawful hostility. The task is further complicated where, as here, the employee would have been protected by a contractual just cause standard for dismissal but for the unlawful termination. SEE ALSO BOARD OF REGENTS V. STATE PERSONNEL COMMISSION, 254 WIS.2D 148, 167-73 (2002) (holding that the just cause standard in the state civil service law does not permit back pay or reinstatement to be limited based upon "after acquired evidence" of misconduct, but rather requires a separate, independent hearing accompanied by the normal due process antecedents of notice and opportunity to respond). Finally, it bears consideration that our traditional monetary remedy of back pay alone is relatively modest in comparison with what is available to victims of other forms of employment discrimination, which encompasses compensatory damages, attorneys fees, and sometimes punitive damages. For these reasons, we decline to limit our traditional remedy of reinstatement and back pay based upon evidence discovered after the discharge. 8/ Since Ms. Finkelson would have been beyond probation had she not been terminated on January 16, 2002, we also reinstate her to non-probationary status. 9/

8/ We recognize that we have traditionally accompanied the "in-part" standard for determining violations of Section (3)(a)3 with the caveat that, where the employer has established contemporaneous lawful motives that would have led to the adverse action even in the absence of the unlawful motive, reinstatement and/or full back pay could be limited. ERD V. WERC, 122 WIS.2D 132, 143 (1985). However, sorting out such contemporaneous lawful and unlawful motives based on evidence of what actually occurred is a far less speculative task than discerning how things might have played out retrospectively if the employer had known of certain misconduct that it may never have discovered at all but for the discharge. This is also to be distinguished from situations where the employer can establish that the employee would have lost his position because of an intervening reduction in force, where such situations do not involve retrospective speculation about the employer's motive or about "just cause." See, e.g., CITY OF EVANSVILLE, DEC. NO. 24246-B (WERC, 9/88); WISCONSIN STEEL INDUSTRIES, 318 NLRB 212, 152 LRRM 1125 (1995), and cases cited therein.

9/ We note, however, that, should Ms. Finkelson accept reinstatement, the County is entitled to take appropriate steps to impose whatever discipline it believes it can justify based upon the misconduct it believes it has discovered, subject, of course, to Ms. Finkelson's and the Union's right to use the grievance procedure to challenge such discipline.

We also decline Ms. Finkelson's request for front pay and attorney's fees. The Commission has not had occasion to decide whether front pay would be an appropriate substitute for reinstatement. We note that front pay is available in employment discrimination cases "where reinstatement is not feasible." Lindemann and Grossman, EMPLOYMENT DISCRIMINATION LAW, VOL. II at 1815 (BNA 1996). The parameters for establishing that

reinstatement is not "feasible" are inconsistent, as reflected in court decisions in employment discrimination cases. Some courts have been stringent in requiring proof of hostility beyond what is normally generated by litigation. SEE, E.G., SQUIRES V. BONSER, 54 F.3D 168, 174-75 (3RD CIR. 1995). Other courts have granted front pay simply to avoid displacing the employee who had been hired to replace the plaintiff. SEE, E.G., DELOACH V. DELCHAMPS, INC., 897 F.2d 815, 822 (5th Cir. 1990). The NLRB has recently authorized its regional attorneys "to consider the issue of front pay as a remedy in an appropriate case," and set forth a series of guidelines for doing so. General Counsel Memorandum 00-01 (February 3, 2000). However, the NRLB's General Counsel has taken a cautious approach:

> [T]he standard Board remedy for discriminatory discharges should continue to be reinstatement. Reinstatement better effectuates the purposes and policies of the [NLRA] because it restores the employee to the circumstances that existed prior to the Respondent's unlawful action, or that would be in effect had there been no unlawful action. However, there are some limited areas in which reinstatement is either impossible or highly undesirable . . . . They include: (a) where the wrongdoer has impaired his victim's ability to work, . . .; (b) where the employer remains hostile to the employee and the employees presently at work are also hostile to the discriminatee . . .; (c) where the discriminatee is close to retirement; (d) as a substitute for a preferential hiring list.

The NLRB's cautious approach seems wise to us. The record in the present case does not establish extraordinary animosity between the parties or other special circumstances that would militate against reinstatement. Indeed, the County would have continued Ms. Finkelson's employment if the Union had agreed to extend her probation. It is true that Ms. Finkelson has not sought reinstatement, but circumstances may have changed since she disclaimed that interest. For example, having been unsuccessful in her request for front pay, she may find reinstatement more attractive. However, while we have ordered the County to offer Ms. Finkelson reinstatement, if that offer is not accepted, the County's liability for back pay will be tolled as of the date of refusal.

Regarding attorney's fees, the Commission has long construed this remedy to be limited to certain duty of fair representation cases and to cases where an extraordinary remedy is appropriate. SEE MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81), AFF'D IN PERTINENT PART, MTI V. WERC, 115 WIS.2D 623 (CT. APP. 1983); UNIVERSITY OF WISCONSIN-MILWAUKEE (GUTHRIE), DEC. NO. 11457-F (WERC, 12/77); DEPARTMENT OF EMPLOYMENT RELATIONS (UW HOSPITAL AND CLINICS), DEC. NO. 29093-B (WERC, 11/98). We see no reason to reconsider the Commission's view of its remedial authority regarding attorney's fees in the context of this case and conclude that an extraordinary remedy is not needed. Hence we deny Ms. Finkelson's request.

For the foregoing reasons, we conclude that Ms. Finkelson was discharged at the conclusion of her probationary period at least in part out of animus toward her lawful, concerted activity in protesting the Spreadsheet, and we order her reinstated with back pay. We decline to award front pay or attorney's fees.

Dated at Madison, Wisconsin, this 28th day of November, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.