

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WISCONSIN PROFESSIONAL EMPLOYEES COUNCIL,
WFT LOCAL 4848, Complainant,**

v.

WISCONSIN DEPARTMENT OF COMMERCE, Respondent.

Case 538
No. 62619
PP(S)-335

Decision No. 30738-A

Appearances:

Mr. Tom Ellett, Representative, Wisconsin Federation of Teachers, 1334 Applegate Road, Madison, Wisconsin, appeared on behalf of the Complainant

Mr. David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin, appeared on behalf of the Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On August 15, 2003, the Wisconsin Professional Employees Council, WFT, Local 4848 filed a complaint of unfair labor practice alleging that the State of Wisconsin, Department of Commerce had violated Sec. 111.84(1)(a) and (c), Stats., by disciplining Al Rabin for asserting rights protected by Sec. 111.82 Stats. The Commission, on November 13, 2003 appointed William C. Houlihan, a member of its staff, to act as Examiner. A hearing on the matter was conducted on February 17, 2004, in Madison, Wisconsin. A transcript of the proceedings was made and distributed by March 8, 2004. Post-hearing briefs were submitted and exchanged by June 3, 2004.

No. 30738-A

FINDINGS OF FACT

1. Wisconsin Professional Employees Council, WFT, Local 4848, (WPEC) is an employee organization whose purpose is to represent employees in collective bargaining with the employer, or its agents, on matters pertaining to terms and conditions of employment

2. The Department of Commerce is an Agency of the State of Wisconsin.

3. Al Rabin is an Advanced Grant Specialist, employed by the Department of Commerce. Mr. Rabin has been employed by the Department of Commerce (formerly the Department of Development) for a period of 11 years. Mr. Rabin has been a member of his Union, the Wisconsin Professional Employees Council, WFT, Local 4848 for approximately 10 years. Mr. Rabin has been active in the workplace on behalf of his Union since his election as Recording Secretary in approximately February, 2002. Mr. Rabin was selected to be a Union Steward in approximately September, 2002.

4. Mr. Rabin has received the following discipline/work directives in his tenure with the Department of Commerce:

August 6, 1998

Mr. Alan I. Rabin

...

The prohibited acts the Department has reasonable grounds to believe that you may have committed along with the applicable Work Rules of the Department are set out below:

1. During the month of December 1997, you positioned a tape recorder in your workplace that was both visible to your co-workers and able to record their spoken word. The Department understands that you acknowledged that you put the tape recorder on the top of the partition in your workplace to silence your co-workers. Several of your co-workers stated that they were uncomfortable or intimidated by your act.

The above act of threatening or intimidating others, if found to be true, would in the opinion of the Department constitute a violation of Work Rule D2. Work Rule D2 prohibits: "Threatening or intimidating others or using abusive or profane language towards others including making ethnic slurs."

2. On or about February 18, 1997, it is understood that you provided a copy of the attached document which includes what appears to be the accepted Christian version of "The Lord's Prayer" as well as a "Ebonics" version. It is further understood that your communication of this material was not part of your work responsibilities. The document could be interpreted as being insensitive to, disrespectful of, or creating a hostile environment for African-American employees who are Christians as well as other employees who are Christian also. There are also reported incidents of you telling various Department employees what they believe were derogatory jokes involving Christians, African-Americans, the Pope and the Virgin Mary.

The above acts of using profane language towards others including making ethnic slurs, if found to be true, would in the opinion of the Department constitute a violation of Work Rule D2. Work Rule D2 prohibits: "Threatening or intimidating others or using abusive or profane language towards others, including making ethnic slurs."

3. On or about December 5, 1997, you accused your supervisor, Todd Kearney, of "anti-semitic conduct" (sic) and made these statements to other employees. It also appears that you may have made these statements to Senator Kohl and Senator Feingold (See Memorandum of December 5, 1997). The Department investigated these statements you made and does not find any validity to them.

The above acts of making false statements, if found to be true, would in the opinion of the Department constitute a violation of Work Rule D6. Work Rule D6 prohibits: "Making false or malicious statements concerning other employees, supervisors or the department."

...

Corey R. Hoze /s/
Corey R. Hoze
Administrator
Division of Economic Development

...

July 23, 2001

Al Rabin

...

Dear Mr. Rabin:

Todd Kearney and I have previously spoken to you concerning your behavior and the comments that you have made to me, to staff in the office, as well as to Department customers. Specifically, we have discussed inappropriate and unprofessional comments that you have made during meetings with me and with other staff members. Although we have previously discussed with you your comments and behaviors, there have been continued instances where employees have reported actions by you that were inappropriate and unprofessional. I am, therefore, providing you with this non-disciplinary letter of direction.

During the past year, in or near your workplace, you have made comments and statements that were of a disparaging, ridiculing or belittling nature against one or more specific women employed in the Wisconsin Department of Commerce (Department) and of women in the workplace in general and their incapacity, in your understanding, to be able to work as managers. Your conduct and behavior may have the effect of creating a hostile work environment and in intimidating women in the workplace. Additionally, your conduct and behavior may have the effect of hindering the effective and efficient operation of the Department, adversely affecting discipline and morale in the workplace, and fostering disharmony in the offices of the Department.

During the past year, in or near your workplace, you have made comments and statements that are of an insubordination, disparaging, ridiculing, accusatory and/or malicious nature against one or more supervisory or management employees employed in the Department. Your conduct and behavior may have the effect of hindering the effective and efficient operation of the Department, adversely affecting discipline and morale in the workplace, and fostering disharmony in the offices of the Department.

During the past year, in or near your workplace, you have made or used verbal and/or non-verbal means of conduct, behavior and communications of a belligerent, intimidating and accusatory nature in meetings with and in relating to other co-workers in the Department. Your conduct and behavior may have the effect of hindering the effective and efficient operation of the Department,

adversely affecting discipline and morale in the workplace, and fostering disharmony in the offices of the Department.

As a result of these comments and behaviors, it is necessary that I issue to you the following work directives:

- 1) During the workday, you are expected to conduct yourself in a professional manner and your communications with Department managers, co-workers, customers or me are to be courteous, respectful and composed.
- 2) During the workday, you are not to engage in, display, or exhibit in any of way any of the types of comments, statements, behaviors and/or communications more specifically identified above in this letter.
- 3) You are to follow both written and verbal work directions from me. If you need clarification regarding the work directions, you should ask such questions of me before completing the assignment.

Although I do not expect further instances to occur, the specific work directives identified above will be carefully monitored and your progress will be reviewed regularly. Future conduct that is not in keeping with these work directives will be treated as violations of the Department's work rules and may result in discipline up to and including discharge. The requirements stated in this letter will remain in effect until rescinded in writing.

Sincerely,

Dana Hoffman /s/
Dana Hoffmann, Director
Bureau of Business Finance

December 18, 2002

...

Mr. Al Rabin

...

Dear Mr. Rabin:

This is a letter of reprimand, issued as a result of your threatening and insubordinate behavior towards me, the Division Administrator. Your actions were in violation of the Department's work rules A1, D1 and D2.

...

This action is based on the following facts. On December 11, 2002, you came into my office uninvited, and demanded a copy of the script for a skit the Division was presenting at the agency holiday party later that day. After I gave you the script, you sat down at my desk, you leaned over my desk, and with clenched fist and threatening arm motions, loudly proclaimed that you and others despised me, were happy that the incoming administration was going to quickly and thoroughly do away with me. You continued on with this tirade for several minutes, your voice becoming louder as you spit out your words from between clenched teeth. Your voice was loud enough to be heard by others outside my office. I felt threatened and frightened by your behavior.

Your behavior was unprofessional and inappropriate and created a situation that fostered fear, hostility, intimidation or the apprehension of harm to me. Your conduct undermines the expectation of Commerce employees for a safe and secure workplace.

Further violation of the Department of Commerce work rules will result in progressively more severe discipline and could result in termination of your State employment.

...

Sincerely,

Peggy Lescrenier /s/
Peggy Lescrenier
Administrator, Division of Community Development

5. On, or about May 8, 2003 Rabin met with Vinnie S., an Information Technology Specialist employed by the Department of Commerce. Mr. Rabin had a list of employees who had received Discretionary Compensation Adjustments, (DCA) and was sharing the list with Mr. S., when S. pointed to a name on the list, A.C., a Manager, and indicated he had found pornography on her laptop, and further indicated that she had received only a written warning over the incident.

6. Following his conversation with Mr. S., Mr. Rabin communicated what he had been told to a number of co-workers.

7. On May 9, 2003 Mr. Rabin sent the following e-mail to the noted recipients:

From: Rabin, Alan
Sent: Friday, May 09, 2003 3:37 PM
To: Bartz, Dale; Storey, David – COMM; Danowski, Ronald;
Beglinger@WFT.org
Cc: Verberkmoes, John; Eisman, Nelson; Franks, William; Hynum, Jill; Berry, Edward; bayeager@foxquick.com; Sanderson, Jack;
rabina@tds.net.
Subject: MANAGER'S USE OF LAPTOP FOR PORNOGRAPHY

Importance: High

Dale

Over the last few days I have had to deal with several upset members because of the special treatment accorded to a manager that flagrantly violated Commerce's Administrative Policy and Procedure on Internet and E-mail usage. This incident also appears to violate the policy on a harassment free workplace.

A female manager in the Division of Community Development was caught with pornography on her laptop according to witnesses in IT. It is my understanding that this individual received a warning as the only punishment for this rules violation. Can WPEC members be assured that the same level of discipline will be administered if a member is involved in a similar violation?

Members are incensed because the same person that had pornography on her laptop also received a \$500 Discretionary Compensation adjustment. I hope Commerce does not make it a practice to reward managers that break rules the balance of the workforce has to obey.

Dale Bartz is a Human Resource Specialist, David Storey is Deputy Secretary of the Commerce Department, Ron Danowski is the President of WPEC, Bob Beglinger is the President of AFT Wisconsin, John Verberkmoes is on the Executive Council of WPEC, Nelson Eisman is the Chief Steward of WPEC, William Franks is a steward with WPEC, Jill Hynum is Vice President of WPEC, Ed Berry is Treasurer of WPEC, Beth Ann Yeager is Rabin's personal attorney, Jack Sanderson is a steward at WPEC.

8. This e-mail was subsequently widely circulated within the Department of Commerce. After he issued the e-mail, Mr. Rabin printed the e-mail text and walked around the Commerce building showing the document to 10 – 15 other employees, including WPEC members, employees in other bargaining units, and at least one Manager. When a co-worker mistook the identity of the manager, Rabin corrected him, indicating it was A.C.

9. After work that night Mr. Rabin went to a bar to attend a social gathering of Commerce employees. He brought a copy of his printed e-mail, and distributed it to some of the eight or nine people in attendance. When A.C. showed up, Mr. Rabin left.

10. A.C., the object of the e-mail, was the only female manager in the Division of Community Development at the time the e-mail was sent. Ms. A.C. had received a Discretionary Compensation Adjustment in July 2001. Ms. A.C. received a verbal reprimand in February, 2002 when pornography was found on her state issued computer. Ms. A.C.'s teenage son had put pornography on her computer without her awareness or knowledge. Ms. A.C. found out about the existence of Mr. Rabin's e-mail when she saw it at the bar.

11. Some employees/co-workers supported Mr. Rabin's advocacy. Some employees/co-workers were unhappy with his advocacy and/or representation. A group of employees went to Ron Danowski and asked to have Mr. Rabin removed from his position of steward. One female employee told Danowski that she was afraid of Mr. Rabin. Danowski advised Rabin that certain serious allegations had been made, and if true, the behaviors would have to stop.

12. A.C. filed a complaint against Al Rabin, which contained the following paragraphs:

. . .

Mr. Rabin's e-mail is incendiary, misleading and inaccurate and I believe meant as a personal attack. He has made clear his disgruntlement with my receiving my management position and not him. By copying the e-mail to another member of the division staff, he ensured that the misleading and malicious rumor be spread. Furthermore, I feel violated that a confidential personnel matter was discussed with Al Rabin by a person in IT, whom I assume should be bound by confidentiality in personnel matters. I also have to wonder how he could know that I received a verbal reprimand for the incident.

This all would be bad enough, but at about 5 p.m. on Friday I joined 8-9 other division members for a social hour. Without any prompting, I was told by one colleague that "everyone knew about the incident." One colleague told me

that Al had brought a copy of the e-mail into his office to show him. Another said that yes, Al had been showing it around and discussing it with many persons on both the 5th and 6th floors. After I explained the real situation, several commented that they were under the impression this had all just occurred.

I cannot possibly defend myself against this personal attack except to those closest to me. I should not have to defend myself at all. I have noticed the last several days that a number of colleagues will not make eye contact with me, and others seem to be avoiding me. I believe that my ability and right to operate productively in a respectful workplace has been compromised by Al Rabin's malicious and unwarranted attack on my integrity.

As an aside, but no less important, several of my colleagues, including one of my employees, have expressed feeling vulnerable to similar attacks by Al Rabin, especially given his apparent close relationship with someone in IT who has unlimited administrator access to all Commerce employees' workstations, and apparently no compunction with sharing confidential personnel information.

Al Rabin's harassment of me has created a hostile work environment for myself and others. I don't have any doubt that he will continue to harass me at any opportunity unless he is stopped. He owes me and the entire Division (or more) an apology and he must be prevented from harassing others as well.

13. As a consequence of the e-mail and the letter of complaint, Rabin was issued the following disciplinary letter:

May 22, 2003

Mr. Al Rabin

...

Dear Mr. Rabin:

This is a written letter of suspension in lieu of a 1-day suspension without pay. It is being issued as a result of your violation of Department of Commerce work rules A1, C3, D6 and the Commerce Harassment Free Workplace Policy.

...

This action is based upon the following facts: On Friday, May 9, 2003 you sent an e-mail with the subject line: **MANAGER'S USE OF COMMERCE LAPTOP FOR PORNOGRAPHY** to Dale Bartz (HR) and copied Dave Storey, Deputy Secretary and 10 other individuals in other state agencies and elsewhere. The e-mail singled out the individual by referring to a "female manager within the Division of Community Development." The e-mail contained a number of false and misleading statements, which further demonstrate that this was a personal attack.

Your behavior was unprofessional and inappropriate and has created a situation that fostered intimidation and harassment of another Commerce employee. A formal harassment complaint has been filed with the agency in connection with the events surrounding this incident. Your conduct undermines the expectation of Commerce employees for a safe and secure workplace.

On July 23, 2001, you received a "non-disciplinary letter of direction regarding your conduct, behavior, and communications of a belligerent, intimidating and accusatory nature relating to co-workers and management.

You have been disciplined for a similar work rule violation on a previous occasion as follows:

12-18-2002 Written Reprimand Work rule A1, D1, and D2

According to our progressive disciplinary schedule, your conduct, in this instance would merit a 1 day suspension without pay, this letter of suspension is being issued in lieu of a 1 day suspension and loss of pay in order to maintain the FLSA exempt status of your position. Further violation of Commerce work rules may result in discipline, up to and including the termination of your State employment.

...

Bill Wheeler /s/
Bill Wheeler
Acting Division Administrator
Division of Community Development

14. No manager in the Department of Commerce was hostile, even in part, to Mr. Rabin's exercise of lawful, concerted activity. The disciplinary letter issued on May 22, 2003 was not motivated, even in part, by hostility toward Mr. Rabin's exercise of lawful, concerted activity. The circumstances surrounding the issuance of a letter of discipline to Mr. Rabin do not have a tendency to interfere with the exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. The Wisconsin Professional Employees Council, WFT, Local 4848 is a Labor Organization within the meaning of Sec. 111.81(12) Stats.

2. The State of Wisconsin, Department of Commerce is an Employer within the meaning of Sec. 111.81(8) Stats.

3. Al Rabin, an individual, is an employee within the meaning of Sec. 111.81(7) Stats.

4. The e-mail sent on May 9, 2003 was an effort to assist a labor organization, and to engage in mutual employee protection within the meaning of Sec. 111.82, Stats. However, a portion of the content of the e-mail, and the subsequent distribution of its contents fell outside the scope of mutual aid and protection of Sec. 111.82 Stats.

5. That the May 22, 2003 discipline of Al Rabin did not violate either Sec. 111.84(1)(a) or (c) Stats.

ORDER

That the complaint filed in this matter be dismissed.

Dated at Madison, Wisconsin, this 23rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/

William C. Houlihan, Examiner

STATE OF WISCONSIN
DEPARTMENT OF EMPLOYMENT RELATIONS (COMMERCE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The basic facts underlying this dispute are not much in dispute. Al Rabin has been an employee of the Department of Commerce for approximately 11 years prior to the event leading to this proceeding. Mr. Rabin has been a member of his Union for about 10 years. He was elected to the position of Recording Secretary in February 2002, and appointed Steward in September 2002. Prior to his election as Recording Secretary the Union had little presence in the workplace at Commerce. Mr. Rabin is a very aggressive, outspoken Union advocate. His testimony indicates that his actions are welcome by a number of co-workers. Other record testimony is that his actions are resented by others.

Mr. Rabin has a work history that includes discipline and warnings that relate to his working relationships with co-workers and supervisors. The August 6, 1998 letter characterizes his behavior as “threatening or intimidating others”, “insensitive to, disrespectful of, or creating a hostile environment”, “using profane language”, “making false statements”.

The July 23, 2001 letter of direction references behaviors deemed “inappropriate and unprofessional”, “disparaging” of women in the workplace, “insubordination, disparaging, ridiculing, accusatory and/or malicious nature against one or more supervisory or management employees...”, acted in a “belligerent, intimidating, and accusatory nature...” Rabin is directed to stop engaging in such behavior.

These matters occurred before Mr. Rabin was elected to Union post.

The reprimand issued in December, 2002 complains of outrageous behavior, similar to that noted in the previous warnings/directives. A portion of the described exchange was overheard and corroborated by a witness in this proceeding. A grievance was filed and withdrawn. More severe discipline was threatened should the behavior continue.

The May 9 e-mail was sent to 11 people, including Union, Management, and Rabin’s personal Attorney. He additionally discussed it with 10 – 15 people in his building, some of whom were in the bargaining unit, some not. Some were in management positions. He later went to a bar to share the e-mail with a work group who assembled to have a drink after work on a Friday. The e-mail was sent at 3:37 P.M. Mr. Rabin certainly engaged in a concerted effort to distribute it in the ensuing two hours.

The e-mail was misleading and reckless. There was no effort to verify its claims. At the time there was only one female Manager in the Division of Community Development, a fact certainly known to the recipients of the e-mail, and the balance of the distribution group. The accusation that an individual violated work rules by bringing pornography to the workplace has an inherently demeaning, embarrassing, humiliating quality. It is different in kind from an accusation that someone has violated work rules by failing to care for company property.

In the subject line of the e-mail, the manager did not “USE...LAPTOP FOR PORNOGRAPHY”. The sin of the manager was her failure to secure her computer against her teenage son. The reference to “over the last few days” appears to be a reference to one day. “I have had to deal...” is a curious way to describe the process of initiating contact with a number of people with what appeared to be a pretty sexy story, and measuring their reactions. It does not appear that there was any “special treatment” afforded the manager. It is unclear that any “flagrant” violation occurred. Given the fact that no one, including the Manager, was aware of the porn, it is not obvious how the “policy on a harassment free workplace” was violated.

The “witnesses in IT” turn out to be a single fellow. The last paragraph implies that the DCA constituted a reward in the face of egregious behavior. It ignores the sequence of events and the fact that the reprimand was fifteen months old and the DCA two years old. Mr. Rabin didn’t know most of the facts when he sent his e-mail. It is in that context that he worked to disseminate the document.

Sec. 111.84(1)(c) makes it an unfair labor practice for the employer “to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment...” To prove a violation of Sec. 111.84(1)(c) Complainant must, by a clear and satisfactory preponderance of the evidence establish that; (1) Complainant was engaged in activity protected by Sec. 111.82 Stats., (2) the employer was aware of the activity, (3) the employer was hostile to the activity; and (4) the employer disciplined Mr. Rabin, at least in part, based upon hostility to his exercise of protected activity. *MUSKEGO-NORWAY C.S.J.S.D. NO.9 v. WERB*, 35 Wis. 2D 540 (1967), *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 Wis. 2D 132 (1985), *STATE OF WISCONSIN, DEC. NO. 30167-B, 4/2/02*. Derivative alleged violations of Sec. 111.84(1)(a) Stats., are decided under a Sec. 111.84(1)(c) type analysis, as are alleged independent violations of Sec. 111.84(1)(a). *FINKELSON v. CLARK CO.*; DEC. NO. 30361-B, (11/28/03).

The parties dispute whether or not Al Rabin was engaged in protected concerted activity. The employer views the act as an individual acting alone, in pursuit of an agenda against women and managers. Rabin was an unsuccessful candidate for the job secured by A.C., and the e-mail is alleged to be the latest incident of anti-social behavior engaged in by

Mr. Rabin. The fact that Rabin acted alone does not preclude the action from being treated as concerted. On its face, he appears to express a concern over the special treatment of a supervisor on a matter potentially faced by a member. He protests the financial reward of a manager at a time when the WPEC was in negotiations for a long expired contract and the employer claimed to have no money. He shared his concerns with co-workers before filing the e-mail. It is easy to regard this e-mail as a shot across the bow of management should it contemplate future discipline of a bargaining unit member. It is, as is argued by the Union, an effort to educate, agitate, and organize.

However, the e-mail was also an unwarranted attack on the supervisor. It identified her to the intended audience. It made assertions of an embarrassing character. It was a blend of misstatements and hyperbole, built on a grain of truth. The legitimate collective interest was modest. There appears to be no pressing controversy prompting the e-mail. There is nothing in the record that suggests disparate application of relevant rules. The exposé was mean spirited and humiliating. The disparity was magnified by distributing the document at an after work social gathering.

On balance, I believe that some of Mr. Rabin's activities constituted protected concerted activity, but that some went so far beyond rational pursuit of collective gain as to be unprotected.

The employer was certainly aware of Mr. Rabin's actions. That is not a matter of dispute in this proceeding. The essence of the employers ire is the widespread dissemination of the e-mail and its contents.

There is no record evidence of employer hostility toward the protected component of Rabin's behavior. However, Rabin was disciplined for the issuance of the e-mail. He was acting in his capacity as Union steward and the subject matter of the e-mail is protected. The question presented is whether the discipline was meted out for the harassment of the supervisor or was, even in part, a reaction to an aggressive union steward attempting to vigorously enforce the rights of those in the unit. If the latter, hostility may be inferred. The discipline of a union steward under the circumstances of his effort to enforce the contract is subject to heightened scrutiny, because it has the inherent potential to chill the exercise of Sec.111.82 rights. (STATE OF WISCONSIN; DEC. No. 30340-A, 8/15/03). That said, the Union official remains an employee, and as such is not immune from discipline. (MILWAUKEE COUNTY; DEC. No. 27664-A, Crowley, 10/93). Sec. 111.84(1)(c) prohibits discrimination in response to protected activity. The law seeks to guarantee a neutrality in the application of discipline. (STATE OF WISCONSIN, *supra*)

I do not believe there exists any basis to infer an anti-union or hostile motive to the employer in this instance. There is no independent evidence of hostility. It is appropriate to draw reasonable inferences from all of the facts and circumstances. However, there must be

some factual basis in the record upon which to draw such an inference. (CITY OF MADISON; DEC. NO. 30472-A; Nielsen, 2/4/03). Mr. Rabin has a history of discipline. He has previously been disciplined for behaviors variously described as “threatening”, “hostile”, “insensitive”, “disrespectful”, “false statements”, “disparaging of women”. He has been directed to stop. This earlier discipline occurred before he held union office, and appears to have no relationship to any union activity. When he persisted, and engaged in a personal attack on Lescrenier, he was given a reprimand and advised that further such conduct would result in an escalation of discipline. The e-mail prompted such discipline. I believe the record supports a conclusion that Rabin would have been disciplined for this e-mail, or one like it, in the absence of a protected message content.

The fact that the latest incident comes wrapped in an otherwise protected package does not immunize it from legitimate discipline. The Commission has let stand discipline meted out for a bad faith personal attack which was contained in the text of a grievance. (CITY OF KENOSHA; DEC. NO. 25226-B, 2/89). Given the circumstances surrounding the e-mail there is a paucity of good faith. The document was calculated to embarrass and humiliate A.C. It was issued without regard for the facts, and is filled with deliberate misrepresentations. The law is designed to protect those engaged in concerted workplace activities. It does not exist to establish a higher disciplinary hurdle for union activists. (FINKELSON V. CLARK CO., *supra*)

This is not a case where intemperate words are exchanged in the heat and frustration of a tense moment. Labor relations often are conducted in a tense, confrontational, chilly atmosphere. It is easy for emotions and hard feelings to run high. In that context, the law tolerates a lot, particularly where there occurs a regrettable spontaneous exchange. Here, Mr. Rabin thought about the e-mail for a day before he sent it. He talked with co-workers first, and sought their counsel. He was not provoked or drawn into a heated exchange. His e-mail was calculated. This is also not a case where employee conduct, previously tolerated, becomes intolerable when the employee becomes active on behalf of the Union. The facts in this case are directly contrary. Mr. Rabin was previously disciplined for similar types of behavior, at a time when he was not active on behalf of the Union. The discipline has remained consistent through the intervening event of his election to Union office and selection as steward.

I believe the employer was motivated by its perception that Mr. Rabin’s conduct was as described in its May 22, 2003 letter of discipline. I further believe that the employer regards such behavior as inherently destructive of the workplace climate. This has been an expressed concern of this employer throughout Mr. Rabin’s employment, both before and after he became active in the Union. Each discipline has been issued by a different supervisor. There is nothing in the record to suggest that he has been singled out or subjected to a disparate level of treatment.

Where the employer is motivated by legitimate business needs, the act of invoking discipline to achieve those objectives is not violative of SELRA, notwithstanding the inherent potential for adversely influencing protected activity. (CEDAR GROVE-BELGIUM SCHOOL DISTRICT; DEC. NOS. 25849-A,B, 7/92; DESPEARS V. MILWAUKEE COUNTY; DEC. NO. 28951-B, 7/23/98; STATE OF WISCONSIN, *supra*). Here, the facts suggest that the impact of Mr. Rabin's discipline on protected concerted activity is negligible. The employer has a legitimate business purpose to be achieved; the protection of supervisors and co-workers from threatening behavior and harassment in the workplace. The employer owes such protection to the workforce assembled in an employer controlled workplace. It further faces an increasing vicarious liability for harassing workplace behaviors that should be within its control.

Nothing in the record suggests that employees will mistake the discipline as a reaction to protected activity. The employer was right on the facts. The discipline was consistent with prior discipline issued for similar behaviors by the same individual before he was active in the Union. Nothing in the record suggests that this discipline exists in a context of Union adherents being systematically subjected to adverse treatment as a consequence of, or attendant to their participation in concerted activities. In summary, I do not regard this discipline to have the likelihood of interfering, restraining, and/or coercing others in the exercise of rights guaranteed in Sec. 111.84(2) Stats.

The question presented in this forum is whether or not the law has been violated. What is neither pled nor addressed in this proceeding is whether or not the collective bargaining agreement has been violated. Much of the post-hearing argument addresses the propriety of the discipline. Questions such as whether or not the procedural and substantive requirements of just cause are satisfied and whether the employer's justification for discipline should be limited to the reasons set forth in the May 22, 2003 letter are matters properly decided by a grievance Arbitrator. They have tangential relevance in this forum in the analysis of whether the employers proffered explanation of its discipline is pretextual. Similarly, the claim that the e-mail was created and sent on employer time, and with employer equipment may or may not offend some provision of the collective bargaining agreement. That matter is not raised in the May 22 letter, and is relevant in this proceeding only as an inherent component of the discipline for unacceptable workplace behavior.

Dated at Madison, Wisconsin, this 23rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/

William C. Houlihan, Examiner

WCH/gjc
30738-A

