STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH R. SOSA, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 614
No. 66889
MP-4339

Decision No. 32238-A

Appearances:

Larry A. Johnson, Attorney, Cross Law Firm, S.C., 505 Arcadian Avenue, Waukesha, Wisconsin 53186, appearing on behalf of the Complainant.

Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Rm 303, Courthouse, 901 N. 9th Street, Milwaukee, Wisconsin 53233, appearing of behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Joseph R. Sosa (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on April 6, 2007, alleging that Milwaukee County (Respondent) had committed prohibited practices in violation of Sec. 111.70(3), Stats. On October 10, 2007, the Commission appointed Coleen A. Burns, as Examiner, to conduct a hearing on the complaint and issue Findings of Fact, Conclusions of Law, and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. A hearing was held in Milwaukee, Wisconsin on November 29, 2007; which hearing was transcribed. Complainant and Respondent filed post-hearing written argument; the last of which was received on February 18, 2008.

Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Complainant, Joseph R. Sosa, is an adult residing in Milwaukee, Wisconsin.

2. Respondent, Milwaukee County, has its principal office located at 901 North 9th Street, Milwaukee, Wisconsin 53233.

3. At all times material hereto, Complainant has been employed by Respondent in its Department of Human Services. Prior to November 2006, Complainant was a member of the bargaining unit represented by AFSCME Council 48, Local 594; hereafter Union. In 2003, Complainant was elected to a two-year term as Vice President-Chief Steward of the Union. Prior to that time, Complainant had been a Union Steward for approximately ten years, as well as a member of the Union's Executive Board. As a Union representative, Complainant was responsible for filing grievances, attending disciplinary hearings, and generally enforcing the labor contract between the Union and Respondent. In that capacity, Complainant regularly interacted with Respondent's management staff, including Department of Human Services Section Managers Norma Broaden (Velasquez), Keith Parris, Diana Jenkins, and Michael Barber, as well as Bureau Administrator Felice Riley.

4. On June 14, 2000, following competitive examination, Complainant was placed on the eligible list for the position of Economic Support Supervisor 1 – Bilingual (Spanish) and the position of Economic Support Supervisor 1. The position of Economic Support Supervisor 1 – Bilingual (Spanish) and the position of Economic Support Supervisor 1 are two separate classifications. By letter dated December 9, 2005, Human Services Employment and Staffing Manager Daniel L. Pierzchala notified Complainant, an Economic Support Specialist, that Complainant's request to have his name restored to the eligible lists for the position of Economic Support Supervisor 1 – Bilingual (Spanish) and the position of Economic Support Supervisor 1 had been granted; with the effect that Complainant's name would be added to these lists with the same score that he had originally earned for up to one year from the date of the letter or for one refusal of employment with Milwaukee County. Promotional decisions on supervisory positions are within the discretion of management and placement on the eligibility list does not guarantee that an employee will be promoted or certified to the appointing authority each time a vacancy is to be filled.

5. In February of 2006, there were six open positions of Economic Support Supervisor 1. Complainant was one of seven employees on the eligibility list for Economic Support Supervisor 1 interviewed for these positions by Department of Human Services Section Managers. Prior to that time, Complainant had interviewed for other Economic Support Supervisor 1 positions, but had not been offered any of these positions. Following these interviews, six employees other than Complainant were offered the open Economic Support Supervisor 1 positions. The offered positions were not bilingual. In March 2006, Complainant learned that he had not received any of the six open positions of Economic Support Supervisor 1. In April 2006, Section Manager Jenkins offered Respondent employee Glynsia Nash a Temporary Assignment to a Higher Classification (TAHC) in the position of Economic Support Supervisor 1. At the time of this offer, Section Manager Jenkins understood that there was no eligibility list and that, therefore, she had the discretion to TAHC an employee into the Economic Support Supervisor 1 position that had not gone through the competitive examination process. At the time that Nash was TAHC'd, she had not taken the

promotional examination for the position of Economic Support Supervisor 1. Nash, who is not bilingual, performed the duties that previously had been performed by Economic Support Supervisor 1 Myrta Casper, who is bilingual. The position to which Nash was TAHC'd was not classified as a bilingual position. In April 2006, Section Manager Jenkins knew that Carrie Colon, who held the position of Economic Support Supervisor 1 – Bilingual (Spanish), was retiring and that Colon's unit had a majority of bilingual customers. Section Manager Jenkins' "big picture plan" was to make use of Complainant's bi-lingual abilities by replacing Colon with Complainant. In July 2006, Section Manager Jenkins offered to TAHC Complainant into the position of Economic Support Supervisor 1 – Bilingual (Spanish); which offer was accepted by Complainant. At that time, Complainant was on the Economic Support Supervisor 1 – Bilingual (Spanish) eligibility list. It is common practice for Respondent to TAHC employees into promotional positions for the purpose of permitting employees to experience the position and managers to evaluate the employees' ability to perform in the position. When Complainant's TAHC ended in September of 2006, Section Manager Jenkins had not received authorization from Bureau Administrator Felice Riley to fill the position permanently and understood that Complainant had not confirmed his educational requirements with Human Resources. In September 2006, Section Manager Jenkins extended Complainant's TAHC in the position of Economic Support Supervisor 1- Bilingual (Spanish). Thereafter, Section Manager Jenkins sought and obtained authorization to permanently fill the position occupied by Complainant. In November of 2006, Complainant was appointed to a permanent position of Economic Support Supervisor 1 – Bilingual (Spanish). In December of 2006, Michael Barber replaced Diana Jenkins as Complainant's Section Manager.

Based upon the foregoing Findings of Fact, the undersigned makes and issues the following

CONCLUSIONS OF LAW

1. Prior to his promotion to a permanent position of Economic Support Supervisor 1 – Bilingual (Spanish) in November of 2006, Complainant was a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70 (l)(j), Stats.

3. AFSCME Council 48, Local 594, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

4. Complainant has established, by a clear and satisfactory preponderance of the evidence, that Complainant has engaged in concerted activity protected by the Municipal Employment Relations Act (MERA).

5. Complainant has established, by a clear and satisfactory preponderance of the evidence, that Respondent and its agents, including Section Manager Diana Jenkins and Bureau

Administrator Felice Riley, were aware of Complainant's exercise of concerted activity protected by MERA.

6. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Section Manager Diana Jenkins or Bureau Administrator Felice Riley are hostile to Complainant's exercise of concerted activity protected by MERA.

7. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent decision, in April 2006, to TAHC Nash, rather than the Complainant, in an Economic Support Supervisor 1 position was motivated, in any part, by hostility toward Complainant's exercise of concerted activity protected by MERA.

8. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent decision, in July 2006, to TAHC Complainant in an Economic Support Supervisor 1-Bilingual position, rather than offer Complainant a permanent position, was motivated, in any part, by hostility toward Complainant's exercise of concerted activity protected by MERA.

9. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent decision, in September 2006, to continue to TAHC Complainant in an Economic Support Supervisor 1-Bilingual position, rather than offer Complainant a permanent position, was motivated, in any part, by hostility toward Complainant's exercise of concerted activity protected by MERA.

10. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70 (3)(a)3, Stats., or a derivatively violated Sec. 111.70(3)(a) l, Stats., as alleged by Complainant.

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

ORDER

The complaint of Joseph R. Sosa is dismissed in its entirety.

Dated at Madison, Wisconsin, this 9th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Joseph R. Sosa (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on April 6, 2007, alleging that Milwaukee County (Respondent) had committed prohibited practices in violation of Sec. 111.70(3), Stats. At hearing, Counsel for Complainant confirmed that the only allegations raised in the Complainant are that Respondent violated Sec. 111.70(3)(a)3, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats. Respondent denies that it has committed prohibited practices as alleged by the Complainant.

POSITIONS OF THE PARTIES

Complainant

From 1993 until 2005, Complainant was a Union steward. As Union steward, Complainant regularly contacted Respondent's Section Managers to advocate on behalf of Union members, which advocacy included processing grievances. Complainant characterizes this relationship with the Section Managers as adversarial; with heated debates.

Between 2000 and March 2006, Complainant interviewed for the Supervisor position approximately seven times without receiving the promotion. Section Managers ultimately decide and recommend promotions to the Economic Support Supervisor positions.

Obviously there was friction between Complainant and the Section Managers. One of the Section Managers, Michael Barber, issued a written reprimand in response to Complainant's exercise of concerted activity. Section Manager Barber was a member of the panel that interviewed applicants for the Supervisor position in 2006.

The hearing record is devoid of any rationale explaining why Complainant was not promoted. The County has exhibited a pattern of refusing to promote Complainant to supervisor.

Respondent has violated Sec. 111.70(3)(a)3, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., by making three promotional decisions based upon hostility toward Complainant's prior lawful, concerted activities as a representative of Local 594. The three promotional decisions are:

1) Failing to promote Complainant, in April 2006, to the position of Economic Support Supervisor; instead promoting a lesser qualified candidate who, unlike Complainant, was monolingual; had not applied for the position; had not passed the required promotional exam; and had not interviewed for the position.

2) Placing Complainant, in July 2006, in a temporary supervisory position, rather than a permanent supervisory position; and

3) Extending this temporary placement on the basis that he was not a team player.

Complainant respectfully requests a finding in his favor. Complainant should be made completely whole and provided such other equitable relief as may be appropriate.

Respondent

Complainant's supervisor detailed the reasonable and job related considerations that went into her promotional decisions. These considerations are consistent with civil service procedures. Complainant claims, but does not establish, that he was by passed for a lesser-qualified candidate.

Complainant's right to promotion is governed by the merit system. Complainant never claimed a merit system violation.

It is not sufficient for Complainant to establish union activism. Complainant must also establish Respondent hostility to such activism.

Complainant has the burden to prove, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70(3)(a) l and 3, Stats. Complainant has not met this burden.

The complaint should be dismissed. Respondent should be absolved of any claim of prohibited activity and provided such other equitable relief as may be appropriate.

DISCUSSION

Applicable Legal Standards

At hearing, Counsel for Complainant confirmed that the complaint is limited to the claim that Respondent has engaged in conduct that violates Sec. 111.70(3)(a)3, Stats., and, derivatively, Sec. 111.70(3)(a)l, Stats. Sec. 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others "to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement."

Under Commission law, as established by the Wisconsin Supreme Court in MUSKEGO-NORWAY SCHOOLS V. WERC 35 WIS 2D 540 (1967), a Complainant who alleges a violation of Sec. 111.70(3)(a)3, Stats., has the burden to prove that:

1) Complainant was engaged in concerted activity protected by the Municipal Employment Relations Act (MERA).
2) Respondent or its agents were aware of that concerted activity;
3) Respondent or its agents were hostile towards that concerted activity; and
4) Respondent or its agents took action towards Complainant that was motivated, at least in part, by its (their) hostility toward that concerted activity.

A Respondent who violates Sec. 111.70(3)(a)3, Stats., derivatively violates Sec. 111.70(3)(a)1, Stats. Sec. 111.07(3), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Sec. 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

As Examiner Millot states in TEAMSTERS UNION LOCAL 563, DEC. NO. 30637-A (12/03); AFF'D BY OPERATION OF LAW, DEC. NO. 30637-B (WERC, 1/04):

> . . . When addressing events that fall outside the statutory period, the Commission has adopted the principles enunciated by the United States Supreme Court in LOCAL LODGE NO. 1424 V. NATIONAL LABOR RELATIONS BOARD (BRYAN MFG. CO.), 362 US 411 (1960) at 418. MILWAUKEE AREA TECHNICAL COLLEGE, ET AL., DEC. NO. 28562-B, (Crowley, 12/95). The Court articulated that there are two situations wherein further consideration is warranted. Those situations include:
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> . . .
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> The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a

> putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.
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> . . .

Merits

Complainant argues that Respondent has taken three negative employment actions against Complainant that are based, in part, upon hostility toward Complainant's protected concerted activity. According to Complainant, the first of these employment actions was a failure to promote the Complainant to an Economic Support Supervisor 1 position in April 2006; the second was placing Complainant in a temporary position of Economic Support Supervisor 1 in July 2006 rather than providing him with a permanent position; and the third was extending Complainant's temporary position of Economic Support Supervisor 1 in September 2006 because he was not a "team player."

As a result of Complainant's many years of activity as Union steward and Executive Board member, Complainant has engaged in concerted activity protected by the Municipal Employment Relations Act (MERA). Complainant's advocacy as a Union representative has made Respondent and its agent managers in Respondent's Department of Human Services, including Felice Riley and Diana Jenkins, aware of the fact that Complainant has engaged in concerted activity protected by the Municipal Employment Relations Act (MERA). Complainant has established the first two prongs of the MUSKEGO-NORWAY test.

Complainant argues that Respondent hostility toward protected concerted activity is evidenced by the failure of Respondent to offer Complainant an Economic Support Supervisor position in February 2006, and before, as well as by Section Manager Barber's imposition of discipline in 2004. The complaint was filed with the Commission on April 6, 2007.

According to the Complainant, the six positions that were the subject of the February 2006 interviews were filled in February of 2006 and, in March 2006, Complainant learned that he had not received one of these positions. (T. 13-15) The legitimacy of Respondent's conduct in not offering one of these six positions, or any other prior position, to Complainant cannot be challenged in this proceeding because it falls outside of the one year period set forth in Sec. 111.07(14), Stats. Under BRYAN, *supra,* Respondent's conduct in not offering one of the February 2006 positions, or any prior position, to Complainant cannot be considered as evidence that Respondent, or any Respondent agent who interviewed or selected employees for such positions, is hostile toward Complainant's exercise of protected concerted activity.

Section Manager Barber disciplined Complainant on May 28, 2004 and, on that date, Complainant was made aware of this discipline. (Comp. Ex. #1) Inasmuch as this discipline

falls outside the one year time limit, the legitimacy of this discipline cannot be challenged in this proceeding. Under BRYAN, *supra*, Section Manager Barber's issuance of this discipline cannot be considered evidence that Section Manager Barber, or any other agent of Respondent, is hostile toward Complainant's exercise of protected concerted activity.

Under the BRYAN analysis, discussed *supra*, other types of Respondent conduct that fall outside the one year time period may be examined for evidence of hostility toward protected concerted activity. Complainant identifies the Section Managers who interviewed him in February 2006 as Keith Parris, Diana Jenkins, Mike Barber, Debbie Bigler and Varetta Harris. (T. 31; 64) Other than not selecting Complainant for a position, Complainant does not identify any conduct surrounding the interview and selection process for the positions that were filled as of February 2006, or prior to that time, that provides a reasonable basis to infer hostility toward Complainant for the exercise of protected concerted activity.

The Complainant discipline dated May 28, 2004 states that Complainant is being issued a written reprimand for violating work rules in refusing to obey orders; refusing to comply with departmental rules; threatening supervisor; and offensive conduct and insubordination. (Comp. Ex. #1) The statements contained in this reprimand notice do not provide a reasonable basis to infer that Michael Barber, or any other agent of Respondent, is hostile toward Complainant for engaging in protected concerted activity.

Complainant's testimony regarding the discussions surrounding his discipline includes the following:

. . .

> Me, as a chief steward, I traveled, I mean, all areas, okay? And I noticed that the radio issue was being enforced on the south side and leaving the Coggs Center, which was the main violators in regards to the radio issue. And then I approached Mike Barber, I told him, why is the south side being attacked, okay? He said, Well, Felice Riley said, and then we exchanged differences, okay?
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> He said, I want all radios to be removed by the end of the day. And in my shift, it would have been 4 o'clock. And I told him, me –I made a wrong choice of words. I said, I told him, I am not going to remove the radio right now, okay?
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> So I went to my cubicle – oh, and before that I told him if this is not settled, you will have a paper trail, okay, in regard to this issue. He felt offended, okay? So I went to my cubicle. I disconnected the radio, and I walked out, put it on my- - the inside of my truck, and I came back and called my 1:30 appointment. And while I was interviewing a client, he handed me this.

> I told him, what is this? He said for refusing to obey orders. I told him, do you see the radio? He said no, but you refused. I told him, but you that I had until 4 o'clock this afternoon. He said, but no, you still refused. (T. 43-44)
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> . . .

When questioned "And when you exchanged these differences, was that a heated conversation, or was it---," Complainant responded that "it got heated." (T. 44-45) Complainant states that "paper trail" meant filing grievances. (Id.)

Neither Complainant's testimony, nor any other record evidence, provides a reasonable basis to infer that, during their interaction on the "radio issue," Section Manager Barber engaged in any conduct evidencing hostility toward Complainant for engaging in concerted activity protected by MERA. Contrary to the argument of Complainant, the evidence of the 2004 discipline does not provide a reasonable basis to infer that Respondent, or any agent of Respondent, is hostile toward Complainant for engaging in protected concerted activity.

Apparently, Complainant is concerned about the fact that Section Managers who interview Complainant for promotional opportunities may see the written reprimand of May 28, 2004. (T. 45) This reprimand was grieved, but not overturned, due to the fact that it was settled under the Union and Respondent's "12 month rule." (T. 100-101) Assuming *arguendo*, that any Section Manager considered this reprimand when interviewing and/or selecting Complainant for promotional opportunities, such consideration would not reasonably indicate that Respondent, or its agents, are hostile toward concerted activity protected by MERA.

Complainant states that he never had any grievances with Section Manager Jenkins because she was willing to meet with him and settle the issue and that he never had any conflict with Section Manager Jenkins. (T. 23; 37) The record is devoid of any evidence that, during the time period in which Complainant engaged in protected concerted activity as a Union representative, Section Manager Jenkins displayed any hostility toward Complainant for exercising rights protected by MERA.

It is undisputed that, in April of 2006, Glynisia Nash was TAHC'd into an Economic Support Supervisor (TAHC) position and Complainant was not. Section Manager Jenkins states that, although Nash was appointed to perform the duties of Myrta Casper and Myrta Casper is bi-lingual in Spanish, the position to which Nash was appointed was a monolingual position; that, when she offered Nash the TAHC position, she understood that there was no eligibility list available for that monolingual position; that, therefore, she had the right to select any individual for the position; that she was aware that Carrie Colon would be retiring; and that the "big picture plan" was to offer Colon's bi-lingual position to Complainant because Colon's unit had a majority of bi-lingual customers. (T. 111-114; 138-140)

It is evident that Section Manager Jenkins needs authorization to fill positions, TAHC or otherwise. (T. 104; 123) It is not evident that any agent of Respondent, other than Section

Manager Jenkins, was responsible for the decision, in April 2006, to offer the TAHC position to Nash and, thus, not to Complainant.

Section Manager Jenkins has offered a plausible non-discriminatory explanation for her decision, in April 2006, to offer an Economic Support Supervisor (TAHC) position to Nash and, thus, not to the Complainant. The record provides no reasonable basis to conclude that this explanation is pretextual. Section Manager Jenkins' conduct in offering the position to Nash and not to Complainant does not provide a reasonable basis to infer that Section Manager Jenkins, or any agent of Respondent, is hostile toward Complainant for engaging in concerted activity protected by MERA.

In July of 2006, Section Manager Jenkins offered Complainant an Economic Support Supervisor 1 – Bilingual (Spanish) TAHC position; which Complainant accepted. (T. 12;35) Section Manager Jenkins states that it is customary for employees to be TAHC'd into new positions so that the employee may experience the position and management may evaluate the employee's performance in the position. (T. 105) Section Manager Jenkins' testimony that it is customary to TAHC employees into positions is corroborated by Complainant's testimony that he is not aware of any employee being promoted to supervisor without first being TAHC'd, except in February 2006. (T. 19-20)

Complainant's belief that, in February 2006, employees were placed into Economic Support Supervisor 1 positions without first being TAHC'd is based upon his understanding of a conversation that he had with one of these employees. (T. 17) Complainant's testimony regarding this conversation is as follows:

> Q: Were these people who were promoted, were they TAHC'd?
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> A: I would say no. Because I talked to Donna Boba, told her, were you TAHC'd? She said no, I'm a supervisor, okay? (Id)

Donna Boba did not testify at hearing. Complainant's uncorroborated hearsay testimony is insufficient to establish that Donna Boba, or any other employee, has been placed into a supervisory position without first being TAHC'd.

Section Manager Jenkins has offered a plausible non-discriminatory explanation for her decision to offer Complainant an Economic Support Supervisor 1-Bilingual (TAHC) position in July 2006. The record provides no reasonable basis to conclude that this explanation is pretextual.

It is not evident that any agent of Respondent, other than Section Manager Jenkins, was responsible for the decision to offer Complainant a TAHC position in July 2006. Section Manager Jenkins' conduct in offering Complainant a TAHC position, rather than a permanent position, does not provide a reasonable basis to infer that Section Manager Jenkins, or any agent of Respondent, is hostile toward Complainant for engaging in concerted activity protected by MERA.

Complainant recalls that, in September 2006, when his TAHC position was coming to an end, he asked Section Manager Jenkins if he would be promoted and she responded "that she was forced to extend it over for at least a couple more months because she felt that I was not a team player." (T. 19) When asked if she ever told Complainant that one of the reasons he was not promoted was because she was not sure he was a team player, Section Manager Jenkins replied "No." (T. 106) According to Section Manager Jenkins, she offered Complainant a second temporary appointment because his educational requirements had not been confirmed by HR downtown and she had not received authorization from the Bureau Administrator to offer a permanent position. (T. 107)

It is not evident that, prior to the conversation of September 2006, Section Manager Jenkins had displayed any hostility toward Complainant, or any other employee, for engaging in concerted activity protected by MERA. Nor is it evident that, during the conversation of September 2006, Complainant's protected concerted activity was a topic of conversation. Assuming *arguendo*, that Section Manager Jenkins made the "team player" remark recalled by Complainant, it would not be reasonable to infer that Section Manager Jenkins would be referencing Complainant's protected concerted activity.

The record provides no reasonable basis to infer that the Bureau Administrator was hostile toward Complainant's exercise of protected concerted activity. Nor does the record provide a reasonable basis to infer that, in September 2006, the Bureau Administrator withheld approval of a permanent position for Complainant based, in any part, upon Complainant's exercise of protected concerted activity.

Section Manager Jenkins has offered a plausible non-discriminatory explanation for her September 2006 decision to continue Complainant in a TAHC position. The record provides no reasonable basis to conclude that this explanation is pretextual. Section Manager Jenkins' conduct in not offering Complainant a permanent Economic Support Supervisor 1-Bilingual position in September of 2006 does not provide a reasonable basis to infer that Section Manager Jenkins, or any agent of Respondent, is hostile toward Complainant for engaging in concerted activity protected by MERA.

Conclusion

Complainant claims, and the record establishes, that, while he was a Union representative, Complainant had heated exchanges with a number of Section Managers and that many of these exchanges occurred at times that Complainant was acting in his capacity as a Union Steward. It is not evident, however, that any Respondent representative, other than Section Manager Jenkins and Bureau Administrator Riley, were responsible for the three Respondent actions that are the subject of this complaint. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Section Manager Jenkins or Bureau Administrator Riley is hostile toward Complainant for his exercise of concerted activity protected by MERA.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent decision, in April 2006, to TAHC Nash, rather than the Complainant, in an Economic Support Supervisor 1 position was motivated, in any part, by hostility toward Complainant for his exercise of concerted activity protected by MERA. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent decision, in July 2006, to TAHC Complainant in an Economic Support Supervisor 1-Bilingual position, rather than offer Complainant a permanent position, was motivated, in any part, by hostility toward Complainant for his exercise of concerted activity protected by MERA. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent decision, in September 2006, to continue to TAHC Complainant in an Economic Support Supervisor 1-Bilingual position, rather than offer Complainant a permanent position, was motivated, in any part, by hostility toward Complainant for his exercise of concerted activity protected by MERA.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70(3)(a)3, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., as alleged by Complainant. Accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 9th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

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