STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JON R. SCHNELLE, Complainant,

vs.

DEPARTMENT OF WORKFORCE DEVELOPMENT,
Division of Unemployment Insurance, Respondent.

Case 807
No. 68475
PP(S)-393

Decision No. 32689-C

Appearances:

Peter Nowicki, President, AFSCME Local 145, 107 North Blair Street, Apartment No. 3, Madison, Wisconsin, 53703, appearing on behalf of Jon R. Schnelle.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Department of Workforce Development, Division of Unemployment Insurance.

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 3, 2009, Examiner Peter G. Davis issued Findings of Fact, Conclusions of Law and Order in the above-referenced matter, in which he held that the Respondent Department of Workforce Development (DWD) did not terminate the employment of the Complainant Jon R. Schnelle (Schnelle) in retaliation for his union activity and therefore did not violate Secs. 111.84(1)(c) and/or (a), Stats. The Examiner dismissed all allegations in the complaint.

On September 23, 2009, Mr. Schnelle filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. Thereafter both parties filed written arguments in support of their respective positions. The record was closed on November 6, 2009, when Mr. Schnelle submitted an e-mail declining the opportunity to submit an additional brief.

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

ORDER

The Examiner's Findings of Fact, Conclusions of Law, and Order are affirmed.[1]

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of December, 2009.

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.

[1] Mr. Schnelle, in his petition for review, takes issue with the Examiner's Findings of Fact in certain respects. The Commission responds to those challenges in the Memorandum Accompanying Order.

DOA-Office of State Employment Relations

MEMORANDUM ACCOMPANYING ORDER

The Examiner's Findings of Facts have been affirmed and can be summarized in most pertinent part as follows. Mr. Schnelle began working for DWD's Division of Unemployment Insurance on May 19, 2008. His duties primarily involved obtaining information from claimants and others in connection with claims for unemployment compensation. DWD furnished him with a computer and internet connection for use in investigating claims. DWD's official work policies restricted personal use of the internet to 30 minutes per day during lunch break with additional use subject to supervisory approval. During Schnelle's orientation to his new job, he was given a review of DWD's work rules, including this one.[2] In practice, it was not unusual for employees to use the internet to varying degrees for personal as well as business reasons during work hours.

Pursuant to the state civil service code, Schnelle, as a new hire, was subject to a six-month probationary period. During probation, an employee such as Schnelle generally may be terminated at DWD's discretion and without DWD having to establish "just cause." The record reflects that Schnelle's job performance generally was competent and he received a positive evaluation on August 15, 2008.

Schnelle sought and obtained supervisory approval to attend the monthly membership meetings of AFSCME Local 145, the union representing certain DWD employees, including Schnelle. The first time Schnelle asked for leave time to attend one of these meetings, his supervisor remarked that Schnelle need to give more advance notice so he and his supervisor could make appropriate arrangements for making up the time. On or about September 19, 2008, Schnelle was elected as Local 145 vice-president. DWD did not learn of this election until October 23, 2008, after supervisors had already decided to recommend termination of his probation. Union witnesses testified that they had historically perceived the Union's relationship with the management of the Division of Unemployment Insurance as relatively poor in comparison with other divisions of DWD.[3]

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[2] The Examiner found in Finding of Fact 3 as follows: "During Schnelle's orientation to his new job, DWD supervisor Brueggeman reviewed work rules and policies-including DWD's policy regarding limitations on personal use of the internet during the work day. Said internet policy restricts personal use of the internet to 30 minutes per day during the employee's lunch break with additional use subject to supervisory approval." Mr. Schnelle contends that this finding is erroneous, because Brueggeman realistically could not have had time to review the many DWD policies "line by line" at orientation. We do not read the Examiner's Finding of Fact 3 to indicate that Brueggeman expressly mentioned each and every DWD work rule line by line during orientation, but simply to state that Schnelle's orientation included a general review of work rules, one of which pertained to personal internet use. The record supports that finding.

[3] The Examiner noted that he did not find this evidence of "general hostility" by DWD toward the Union to be "particularly persuasive" but declined to "make any formal determination as to DWD hostility because, by a large margin, the record as a whole satisfies me that any hostility toward [Schnelle's] protected concerted activity had nothing to do with his termination." Examiner's Decision at 9. Mr. Schnelle has challenged this aspect of the Examiner's decision. As discussed infra in the text, we agree with the Examiner that no finding is required on this subject because, regardless of any generally negative relationship between the Union and the Unemployment Insurance Division, there is virtually no evidence of any hostility specifically toward Schnelle for his Union activities, and because it is clear that Schnelle's termination was solely attributable to his supervisor's belief that Schnelle had failed to follow directives about restricting his personal internet use during work hours.

On September 29, 2008, Schnelle's supervisor was informed by Schnelle's lead worker that Schnelle was using the internet for non-business purposes during work time. Schnelle's supervisor had not previously been aware of the issue. During a conversation on that date between Schnelle and his supervisor about some errors Schnelle had made, the supervisor remarked that Schnelle should devote his full attention to his work rather than being distracted by puzzles, games, and other personal internet activities. Later that same day, the supervisor was informed by the lead worker that she had again observed Schnelle using the internet for personal activities. On October 13, 2008, the supervisor himself observed Schnelle using the internet for personal purposes during work time and directed Schnelle to stop. On October 14 and 15, 2008, the lead worker again advised the supervisor of having observed Schnelle using the internet for personal purposes on work time. Later on the 15th, Shnelle and his supervisor were discussing a situation in which Schnelle reported having difficulty getting a claimant to follow instructions, and the supervisor suggested this was similar to Schnelle not following his (the supervisor's) instructions about the internet. On Friday, September 17, 2008, Schnelle's immediate supervisor was absent from work; Schnelle's lead worker informed another supervisor, Breuggeman, that she (the lead worker) had again observed Schnelle using the internet for non-work purposes during work time. The following Monday, October 20, 2008, Brueggeman met with Schnelle's immediate supervisor and discussed their concerns about Schnelle's internet use. In response to Brueggeman's request, DWD Human Resources supplied Brueggeman a written report the next day (October 21) indicating that Schnelle "averages 4 hours of browse time each day" and "There was no work related activity."

On October 23, 2008, Brueggeman met with Schnelle and informed him that he (Brueggeman) would be recommending termination of Schnelle's probationary employment owing to continued excessive personal use of the internet even after the issue had been brought to his attention. That same day, Brueggeman placed this recommendation in writing to DWD management, who approved it on October 31, 2008. Schnelle's probationary employment was terminated effective November 6, 2008.

Schnelle's claim is that he was terminated at least in part out of DWD's hostility toward his union activity. This claim requires Schnelle to establish four elements: that Schnelle was engaged in lawful concerted activities; that the employer was aware of those activities; that the employer bore animus towards those activities; and that the employer took adverse action at least in part out of that animus. See EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS. 2D 132 (SUP. CT. 1985); STATE OF WISCONSIN, DEC. NO. 30534-B (WERC, 2/05). Here, the Examiner concluded that the record was insufficient "by a large margin" to show that DWD terminated Schnelle for any reason other than his failure to abide by directives to restrict his personal use of the internet on work time. Schnelle's contention to the contrary is largely based on the fact that DWD never expressly warned him that failure to restrict his internet use would result in termination. This failure to warn is primarily what leads Schnelle to believe that his union activity must have played a role.

As we have frequently noted, establishing improper motive is seldom accompanied by direct evidence and instead usually depends upon an assessment of surrounding circumstances. EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis.2D at 143; WISCONSIN RAPIDS SCHOOL

SCHOOL DISTRICT, DEC. NO. 30965-B (WERC, 1/09). We agree with Schnelle that a failure to follow normal procedures, such as warning employees about the consequences of failing to follow directives, can sometimes contribute to a pattern of circumstantial evidence pointing toward improper motives. Here, however, the circumstances as a whole simply do not add up to that conclusion. Even assuming, arguendo, that the Unemployment Insurance Division had a history of hostility toward the Union in some general way, the only Union activity in which Schnelle had engaged, to the employer's knowledge prior to the October 23 meeting prior to which they had already decided to recommend his termination, was attending monthly Union meetings. Other than his supervisor initially requesting that Schnelle provide the proper amount of advance notice before attending such meetings, which does not strike us as remarkable, there is no evidence of friction between Schnelle and DWD about his attending those meetings. As the Examiner noted, absolutely nothing links any ostensible DWD animus toward the Union to either Schnelle's particular supervisors or to Schnelle himself. On the other hand, the record makes clear that Schnelle had engaged in substantial personal use of the internet, that his supervisors were being repeatedly informed about this, that his immediate supervisor directed Schnelle not to continue it, and Schnelle nonetheless did continue it. We agree with Schnelle that the record lacks evidence that he was given any direct and explicit warning that termination might result from disobeying this directive, but such warning (while obviously desirable) is not required in order to terminate a probationary employee. Even assuming arguendo that Schnelle had never been given clear and explicit notice of DWD's rule against excessive personal use of the internet on work time, he had received a direct, personal instruction to the same effect. It appears that Schnelle did not realize how seriously his supervisors were taking this continued improper activity. However, for purposes of deciding this case, the question is whether we are persuaded that such was their actual state of mind, regardless of whether they conveyed that to Schnelle or whether he perceived it. It is clear to us, as it was to the Examiner, that Schnelle's failure to adhere to his supervisor's directives regarding internet use is what led to his termination, and not, in any part, his Union activity.

For the foregoing reasons, we affirm the Examiner's conclusion that the complaint must be dismissed.

Dated at Madison, Wisconsin, this 3rd day of December, 2009.

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.

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