STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHN VERBERKMOES, Complainant

vs.

DEPARTMENT OF CHILDREN AND FAMILIES and
OFFICE OF STATE EMPLOYMENT RELATIONS, Respondents.

Case 830
No. 69708
PP(S)-406

Decision No. 33125-B

Appearances:

Philip E. Klein, 4942 North Sherman Avenue, Unit F, Madison, WI 53704, appearing on behalf of Complainant.

William H. Ramsey, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On March 22, 2010, John Verberkmoes (Verberkmoes) filed a Complaint with the Wisconsin Employment Relations Commission (Commission) asserting that Respondents Wisconsin Department of Children and Families (DCF) and Wisconsin Office of State Employment Relations (OSER) had committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA) by intimidating, retaliating, and discriminating against him for engaging in protected activities related to his duties as union steward. On May 26, 2010, DCF and OSER filed a motion to dismiss the Complaint or, in the alternative, to hold the Complaint in abeyance pending exhaustion of contractual remedies. On September 16, 2010, the undersigned issued an order granting the motion to dismiss all claims except for those alleging violations of Sec. 111.84(1)(c) and (a), Stats. and denying the motion to hold

the Complaint in abeyance.[1] Verberkmoes amended his Complaint on December 16, 2010 to make an additional allegation and a request for an additional remedy.

Hearing was held on the surviving claims on January 13, 2011. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on May 16, 2011 thereby closing the record.

Being fully advised in the premises, I make and issue the following

FINDINGS OF FACT

1. The State of Wisconsin (State) is the employer within the meaning of SELRA.

2. Complainant Verberkmoes is an employee within the meaning of SELRA and works for Respondent DCF. He is represented for purposes of collective bargaining by the Wisconsin Professional Employees Council (WPEC) and serves as a WPEC union steward by assisting and representing other employees in various labor and employment matters. He sometimes engages in steward activity together with Philip Klein (Klein), another WPEC steward. Klein serves as Verberkmoes' representative in this matter.

3. At all times relevant to this matter, David Vergeront (Vergeront) served as Chief Legal Counsel for Respondent OSER. In this capacity, he represented State agencies in various labor relations and civil service proceedings before the Commission, including Respondents DCF and OSER.

4. In the Fall of 2009, Vergeront represented the State, while Verberkmoes and Klein represented an individual State employee in an unfair labor practice complaint case. The Commission interpreted some of the allegations in that complaint as falling within its jurisdiction to hear appeals of certain state civil service actions and provided the complainant in that case the opportunity to file a civil service appeal.[2] In an e-mail dated October 28, 2009 sent to the Commission, another State agency attorney, as well as Verberkmoes and Klein, Vergeront took exception to the Commission's granting of an extension of time to file the appeal:

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[1] DEC. NO. 33125-A (Greer, 9/10).

[2] The complaint and related personnel appeal were ultimately dismissed on timeliness grounds. *See* DEPT. OF WORKFORCE DEVELOPMENT, DEC. NO. 32938-A (Levitan, 1/10), AFF'D BY OPER. OF LAW, DEC. NO. 32938-B (WERC, 2/10) and DEPT. OF WORKFORCE DEVELOPMENT AND OFFICE OF STATE EMPLOYMENT RELATIONS (HARRSCH), DEC. NO. 33023 (WERC, 4/10).

The individuals that are perpetrating this terrific waste of time and effort on the part of all involved have had over 2 years (since the alleged wrongdoing) to attempt to bring this action and now they ask for an 11 day extension? They have had since May 2009, when the WERC dismissed the appeal to commence this action and now they ask for an 11 day extension? How absurd! This is clear cut abuse of process and procedures and harassment for which Respondents place all on notice that it will seek sever [sic] sanctions for this travesty brought on by misguided "jail house" lawyers who have absolutely no respect for laws and rules and obviously have too much time on their hands, time that should be spent on the state's work and not chasing "windmills" and the impossible dream.

Furthermore, the Complaint makes it clear that the alleged action on the part of Mr. Wolle that is required to form the basis for any action based on alleged violation of s. 230.13, Wis. Stats., happened in the first half of 2007. The statute of limitation for a personnel transaction action is 30 days from the action or notice of the action whichever is later. (see s. 230.44(3), Wis. Stats.) [Note: The statute of limitation for SELRA actions – ULPs – is one year from said conduct.] Since a personnel action (Case 3 No. 67256 PA(sel)-44) involving the same basis facts and allegations was commenced well before the hearing in July 2008 and since the complained of act, as alleged now, occurred in April 2007, it is clear beyond any doubt that the complained of action (Pars. C and D) occurred more than 2 years ago and thus clearly more than 30 days prior to the commencement of this action on October 22, 2009. As such the personnel side of the action is terribly untimely on its face and so is the ULP side of the action. It is so untimely (over 2 years) and because of their involvement in the underlying action (PA(sel)-44) and the opportunity to incorporate the present allegations in said action that the perpetrators of this matter have engaged in pure unadulterated frivolous conduct for which Respondents are entitled to attorneys fees and costs and these Respondents will be requesting same when we move to dismiss. [Note: there are other grounds for dismissal which makes the commencement of this action at this time as an egregious abuse of the WERC's processes and procedures which when added to the mix make this a clear cut, slam dunk "frivolous" action easily worthy of fees and costs.] As the WERC knows, fees and costs can be awarded for the frivolous commencement of an administrative proceeding and that is what the "perpetrators" have done.

5. On November 10, 2009, in another e-mail related to the complaint referenced in Finding of Fact 4 that was sent to the Commission, Klein and Verberkmoes, Vergeront stated:

> I need to know first if they intend to pursue the ULP complaint. If so, then pursuant to ERC rules, nothing can proceed becasue [sic] no complaint has been flled [sic] [for Complainant's failure to comply with said rules]. If nothing is filed what is there to proceed with. [sic] We will take this "pig" apart one ham at a time. And when there is something to proceded [sic] with I will file a motion and will seek attorneys fees and costs for this blatant abuse of process and procedure initiated by the Complainant and his representatives.. [sic]
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> So, as I see it, the Complinant's [sic] side needs to indicate their intent with respect to the ULP.

6. During the morning of December 7, 2009, Verberkmoes and Klein traveled to the Commission's offices to file a document on behalf of the complainant referenced in Finding of Fact 4. The document was filed utilizing the Commission's form intended for filing a complaint of unfair labor practices or prohibited practices under the Commission's SELRA and Municipal Employment Relations Act (MERA) jurisdiction. However, the Commission treated the submitted document as alleging subject matter arising under its state civil service appeal jurisdiction.

7. For unrelated reasons, Vergeront was at the Commission's offices at the same time as Verberkmoes and Klein during the morning of December 7, 2009. Although Vergeront previously litigated cases against Verberkmoes, he had not met Verberkmoes in person. The Commission staff member who accepted receipt of the document from Verberkmoes indicated the identity of Verberkmoes and Klein to Vergeront but did not show him the filed document.

8. Later in the day on December 7, 2009, Vergeront contacted Lynn Wieser (Wieser), DCF's human resources director, regarding the status of another case then pending at the Equal Rights Division. During that conversation, Vergeront reported to Wieser that he had seen Verberkmoes and Klein at the Commission's offices during work hours.

9. Prompted by Vergeront's report, Wieser instructed DCF employee Chris Wolle (Wolle) to investigate whether Verberkmoes and Klein were at the Commission's office while on State time. Wolle examined the State's electronic time reporting system, known as PTA, for Verbermoes' and Klein's records for December 7, 2009. PTA showed that Klein took ½ hour of leave time in the morning near the time that Vergeront reported that he saw him at the Commission. However, the entry for Verberkmoes showed a normal work day schedule with no leave time taken in the morning.

10. On December 15, 2009, Vergeront sent an e-mail to Klein related to an ERD matter[3] that stated:

> Just so the record is clear – Discussion of a settlement was not brought up by DCF. I do not know if DCF is interested in a settlement. But that does not mean that it would be adverse to see what might be the bottom line for a settlement that Complainant would accept. I have never viewed capitulation as a reasonable settlement and I can assure that capitulation will never work in this instance.
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> if [sic] Mr. Klein and Ms. Hammes think they have some leverage, i [sic] would point out that the odds of this going forward on January 20 are minimal in light of her situation and if she tries to seek a postponement I would imagine that the table would be reversed and DCF would object. Chicken or hardball can be played by both sides. It works both ways and memories linger when it comes to reciprocity.

11. On December 23, 2009, Wolle e-mailed Verberkmoes' supervisor regarding Verberkmoes' whereabouts on the morning of December 7, 2009. The supervisor replied to Wolle, indicating that she had confirmed with Verberkmoes that he was at the Commission's offices filing documents and that she had subsequently adjusted his PTA entry for the day to reflect 20 minutes of sabbatical time in the morning rather than work time.

12. After filing the instant Complaint and while processing a contractual grievance related to the adjustment of his time records for December 7, 2009, Verberkmoes and Klein submitted requests for information to DCF related to how other DCF employees were treated on December 7, 2009. When making at least one of the requests, Verberkmoes and Klein were in receipt of an e-mail that they believed was responsive to the request. When that e-mail was not produced by DCF, Verberkmoes and Klein brought the e-mail to DCF's attention and provided a copy which was subsequently returned to them. DCF did not intentionally refuse to provide the e-mail in question.

13. Section 2/4/1 of the Collective Bargaining Agreement between the State of Wisconsin and the Wisconsin Professional Employees Council (Agreement) prohibits employees from engaging in Union work on State time unless specifically authorized. Respondents have consistently enforced this contractual prohibition.

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[3] The e-mail was not sent directly to Verberkmoes. However, given that the e-mail was sent in such close proximity to the other communications where Vergeront was aware that Klein and Verberkmoes were co-representing employees, I draw the inference that Vergeront was aware that Klein would share the contents of this e-mail with Verberkmoes.

14. Respondents did not harbor animus toward any lawful concerted activity in which Complainant engaged.

Based on the foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

Because Respondents lacked animus towards any lawful concerted activity by Complainant, they did not commit unfair labor practices within the meaning of Sec. 111.84(1)(c), Stats., or, derivatively, Sec. 111.84(1)(a), Stats.

Based on the foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER

The Complaint, as amended, is dismissed.

Dated at Madison, Wisconsin this 18th day of July, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/

Matthew Greer, Examiner

MEMORANDUM ACCOMPANYING ORDER

The Complaint alleges that Respondents engaged in unfair labor practices under Sec. 111.84(1)(c), Stats. and Sec. 111.84(1)(a), Stats. by scrutinizing and adjusting his time records in order to unlawfully discriminate against him for representing other employees and filing documents at the Commission in his role as Union steward.

In relevant part, Sec. 111.84(1)(c), Stats. makes it an "unfair labor practice for an employer individually or in concert with others…[t]o encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." To establish a claim of discrimination, the Complainant must establish the following four elements by a clear and satisfactory preponderance of the evidence: "(a) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (b) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (c) that the employer bore animus toward the activity; and (d) that the employer's adverse action against the employee was motivated *at least in part* by that animus, even if other legitimate factors contributed to the employer's adverse action." WISCONSIN RAPIDS SCHOOL DIST, DEC. NO. 30965-B (WERC, 1/09) (emphasis in original) (citing MUSKEGO-NORWAY SCHOOL DIST. V. WERB, 35 WIS.2D 540 (1967) and EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985)).

A determination of the merits of the discrimination claim in this case centers on the third element – whether the evidence establishes that Respondents harbored animus towards the alleged protected activity.[4] Animus can be established by direct evidence as well as through an "assessment of surrounding circumstances" to determine whether there is an indication of improper motive. DEPT. OF WORKFORCE DEVELOPMENT, DEC. NO. 32689-C (WERC, 12/09) (*citing* EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D AT 143; WISCONSIN RAPIDS SCHOOL DIST., DEC. NO. 30965-B (WERC, 1/09)). The evidence of animus relied upon by Verberkmoes consists of: 1) statements made and legal positions taken by Vergeront when representing his clients in legal matters before the Commission and Equal Rights Division[5]; 2) the review of his time records for December 7, 2009; 3) the treatment of other employees in relation to December 7, 2009 "working lunches"; and 4) inadequate responses to requests for information.[6]

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[4] The Parties disagree as to whether or not Verberkmoes was engaged in lawful concerted activity when filing the document at the Commission on December 7, 2009. Respondents argue that the conduct was not lawful concerted activity because Verberkmoes filed the document while on State time and no contractual or other authority permitted him to engage in such activity on State time. Verberkmoes in turn argues that DCF policy entitles him to paid break periods and that he filed the document at the Commission within the time normally allowed for breaks. For the sake of argument, I will assume that Verberkmoes engaged in lawful concerted activity, but, because I find that he failed to prove animus, it is not necessary to make a determination on this issue.

[5] The relevant communications are reproduced in Findings of Fact 4, 5, and 10.

[6] *See* Finding of Fact 12.

Turning first to Vergeront's statements, Verberkmoes specifically identifies three excerpts in his Complaint that indicate animus: 1) "the perpetrators of this matter have engaged in pure unadulterated frivolous conduct," 2) "…a clear cut, slam dunk 'frivolous' action…," and 3) "…Respondents place all on notice that it will seek sever [sic] sanctions for this travesty brought on by misguided 'jail house' lawyers who have absolutely no respect for laws and rules and obviously have too much time on their hands, time that should be spent on the state's work and not chasing 'windmills' and the impossible dream." I first note that these comments, like all of Vergeront's statements in the record, were made during the course of litigation and are directed at the various claims and legal positions that were being advanced by Verberkmoes and Klein. Any animus reflected in the statements is more reasonably interpreted as being directed towards the claims and arguments that Vergeront viewed as frivolous and requiring an inordinate amount of Respondents' resources to defend. While Vergeront's statements certainly consist of colorful colloquialisms and artful allusions to literary and dramatic works, it is a stretch to interpret these comments as being more than energetic responses to various positions and claims that Verberkmoes pursued in those proceedings.

Verberkmoes also points to the fact that Vergeront forcefully argued for an award of attorneys' fees and costs as sanctions in cases brought by Verberkmoes and Klein as evidence of unlawful animus. The evidence establishes that Vergeront argued for sanctions because, in his legal opinion, they were warranted by the facts of that case, not out of animus for Verberkmoes' protected activity. Before officially requesting sanctions, Vergeront explained,[7] albeit in blustery fashion, his theory as to why his client was entitled to such an award. The fact that sanctions were not ultimately awarded does not convert the request into evidence of animus.

Verberkmoes argues that Respondents acted out of illegal animus by having his time records for December 7, 2009 scrutinized and adjusted. The record contains evidence of only one other similarly situated employee – Philip Klein.[8] Like Verberkmoes, Klein is an exempt DCF employed union steward who was at the Commission's offices on December 7, 2009 where he was also identified to Vergeront.

Also like Verberkmoes, he has represented other employees in various matters with Vergeront as adversary, sometimes together with Verberkmoes. Unlike Verberkmoes, Klein used leave time during the morning of December 7, 2009 and therefore when DCF checked his PTA records following Vergeront's report, his time records were not adjusted. There is no evidence that Verberkmoes was treated differently than Klein, or any other employee who DCF believes was engaging in union activity on State time.

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[7] *See* Finding of Fact 4.

[8] Verberkmoes argues, but did not introduce any evidence, that five other union employees had their lunch hours adjusted on December 7, 2009. Even if this is true, Verberkmoes did not argue that these five employees engaged in lawful concerted activity. Therefore, if they were treated in the same manner as Verberkmoes regarding the treatment of the December 7, 2009 lunch, that fact would further undermine his claim that he was singled out for adverse treatment based on his protected activity.

Verberkmoes further argues that animus exists because non-exempt DCF employees were compensated for their working lunches on December 7, 2009 while his time records were adjusted to remove any benefit he might receive related to the working lunch. It is uncontested that Verberkmoes is an exempt employee under the Fair Labor Standards Act and is not entitled to compensation for the working lunch. Although he cites two sections of the Collective Bargaining Agreement to establish that DCF provides Professional Time or Compensatory Time to exempt employees under certain circumstances, he did not introduce evidence to support his claim that he was entitled to such benefit under the circumstances here. Nor did he produce any evidence that other exempt employees who did not engage in protected activity and attended the conference on December 7, 2009 received benefits for the working lunch on that date.

Lastly, Verberkmoes asserts animus is established by the fact that DCF neglected to produce an e-mail that was arguably responsive to a request for information related to how other employees were treated on December 7, 2009. Wolle, the DCF employee who coordinated the response to the information requests, testified that he was not aware of the e-mail in question, but that if he had been aware of it, it would have been produced. Even if the evidence demonstrates neglect on the part of the DCF employees responding to the request, I conclude that it is not evidence of animus towards Verberkmoes' protected activity.[9]

CONCLUSION

For the foregoing reasons, I find that Respondents did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(c), Stats., or, derivatively, Sec. 111.84(1)(a) Stats.[10] Accordingly, the Complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 18th day of July, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/
Matthew Greer, Examiner

[9] The amended Complaint does not specifically allege that the failure to produce the e-mail was a violation of the Sec. 111.84(1)(d), Stats. duty to bargain in good faith. To the extent that it does raise such an allegation, it is rejected because Verberkmoes did not establish that the information request was made on behalf of a labor organization or that it was "relevant and reasonably necessary" to a labor organization's "dealings in its capacity as representative of the employees." STATE OF WISCONSIN, DEC. NO. 17115-C (WERC, 3/82).

[10] Although not specifically alleged, I also find that Verberkmoes failed to establish an independent, non-derivative, violation of Sec. 111.84(1)(a), Stats. Such a claim requires a showing that Respondents engaged in conduct that has a "reasonable tendency to interfere with, restrain or coerce employees" exercising rights guaranteed by Sec. 111.82, Stats. JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), *aff'd*, 187 Wis. 2D 647 (Ct.App. 1994). The evidence is not sufficient to establish that a reasonable person would tend to be interfered with, coerced, or restrained from engaging in protected activity by the actions taken by Respondents in aggressively arguing their positions in litigation and enforcing contractual provisions.