STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**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-C

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**Appearances:**

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

**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 Department of Children and Families and Office of State Employment Relations.

## ORDER ON REVIEW OF EXAMINER'S DECISION

On July 18, 2011, Examiner Matthew Greer issued Findings of Fact, Conclusion of Law and Order in the above captioned matter, concluding that the Complainant John Verberkmoes (Verberkmoes) had failed to establish that the Respondents Department of Children and Families (DCF) and Office of State Employment Relations (OSER) had committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA) and dismissing the Complaint.

On August 8, 2011, Verberkmoes filed a timely petition seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats., and Sec. 111.84(4), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received by the Commission on October 14, 2011.

For the reasons set forth in the Memorandum that follows, and being fully advised in the premises, the Commission issues the following

## ORDER

A. The Examiner's Findings of Fact 1 through 14 are affirmed.

B. The Examiner's Conclusion of Law is amended to state, "The Respondents did not violate Secs. 111.84(1)(a) or (c), Stats.," and as so amended is affirmed.

C. The Examiner's Order dismissing the amended Complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of January. 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

## MEMORANDUM ACCOMPANYING ORDER

### Summary of the Facts

John Verberkmoes is an employee of the State of Wisconsin at the Department of Children and Families (DCF) and as such was at all relevant times a member of a bargaining unit represented by the Wisconsin Professional Employees Council (WPEC or Union). He has been an active Union member and steward but is not an attorney. At all pertinent times, the contract governing Verberkmoes' employment prohibited employees from engaging in Union work on state time unless specifically authorized. OSER has consistently enforced this contractual prohibition.

Beginning in 2007, Verberkmoes and another Union steward, Philip Klein, assisted Keith Harrsch, a former employee in the Department of Workforce Development, in cases/grievances arising out of Harrsch's unsuccessful application in or about April 2007 for employment in the Office of Public Defender. In the course of their steward activities, Verberkmoes and Klein occasionally interacted with OSER attorney David Vergeront.

In the fall of 2009, Verberkmoes and Klein filed an unfair labor practice complaint with the Commission on behalf of Harrsch. The Commission notified them that the complaint appeared to include allegations that might more appropriately be filed as a personnel appeal rather than an unfair labor practice complaint and, in late October 2009, also granted Klein's request for an 11-day enlargement of time to resubmit those allegations as a civil service appeal. Mr. Vergeront took great exception to the Commission's decision to grant the enlargement of time, and, on October 28, 2009, he sent an e-mail to the Commission and the other parties (including Verberkmoes and Klein) in which he stated, inter alia:

> 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? … This is a 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. … [T]he perpetrators of this matter have engaged in pure unadulterated frivolous conduct for which Respondents are entitled to attorney's fees and costs. … [T]his action at this time [is] 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.

On December 7, 2009, DCF conducted an all-day staff meeting in a location separate from its normal offices. The meeting included a working lunch. Verberkmoes and Klein attended that meeting. On route to the meeting, at some point before it began, they stopped in at the Commission's Madison office in order to file an amended complaint on behalf of Mr. Harrsch. Coincidentally, in or around the same time frame, Vergeront stopped by the Commission offices and, in anticipation of his impending retirement and in recognition of his frequent interactions with Commission staff, brought donuts and left them in the Commission's break room. At that time, a Commission staff member mentioned to Vergeront that, coincidentally, Verberkmoes and Klein had just stopped by, as well.

Later on December 7, Vergeront had occasion to contact DCF's human resources director, Lynn Wieser, regarding another matter in which Klein was assisting a DCF employee (Hammes) in a case before the Equal Rights Division. In the course of his conversation with Wieser about the Hammes case, Vergeront mentioned to her that Verberkmoes and Klein had been at the Commission's offices during work hours earlier that day. Wieser then directed DCF personnel to conduct an investigation as to whether the two stewards had taken appropriate leave for that purpose. The investigation ultimately revealed that Klein had taken a half hour of leave but Verberkmoes had not.

On December 10, 2009, Vergeront sent an e-mail to Klein in connection with the Hammes ERD case, in which Vergeront discussed settlement possibilities and alluded to scheduling difficulties that could arise from his (Vergeront's) impending retirement. Vergeront's e-mail included, inter alia, the following statements:

> [I]f Mr. Klein and Ms. Hammes think they have some leverage, I 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.

In the latter part of December 2009, on the basis of its investigation of Verberkmoes' time reporting on December 7, DCF altered Verberkmoes' time records to deduct 20 minutes of leave time to cover his appearance at the Commission's offices on that date. Verberkmoes filed a grievance challenging that leave deduction. On March 22, 2010, he also filed the instant Complaint. In aid of the grievance and Complaint, Verberkmoes and Klein requested documentation regarding how other DCF employees' time was treated on December 7, 2009, and in particular whether and how the working lunch had been handled. They received a spreadsheet showing that non-exempt employees eventually received additional compensation for the working lunch, but exempt employees (such as Verberkmoes) did not receive additional pay. DCF did not supply any other documentation. Verberkmoes and Klein also asked for information/documentation about how their December 7 visit to the Commission came to the attention of DCF management, but did not receive the answer until several months after the instant Complaint and related grievance had been filed.

## Discussion

In the Examiner's view, the Complaint alleged that the Respondents' actions in investigating Verberkmoes' time reports for December 7, 2009 and in retroactively docking him 20 minutes leave on that date to cover the time he spent filing a document at the WERC were taken in retaliation for his vigorous activities as Union steward, in violation of Sec. 111.84(1)(c), Stats. The Examiner properly noted the four elements Verberkmoes would have to satisfy in order to establish that claim, i.e. (1) the employee has engaged in lawful concerted activity (or was believed to have so engaged); (2) the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (3) the employer bore animus toward the activity; and (4) 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. *See* WISCONSIN RAPIDS SCHOOL DIST, DEC. NO. 30965-B (WERC, 1/09) (citations omitted). The Examiner concluded that, regardless of the other elements, Verberkmoes did not satisfy his evidentiary burden to show that the Respondents or their agents harbored animus against Verberkmoes' Union activity. On this basis, the Examiner dismissed the Complaint.

On review, Verberkmoes contends that the requisite animus is amply reflected in this record, to wit: Vergeront made belligerent and threatening statements in his e-mails to the WERC and ERD that were personally directed at Verberkmoes and Klein for the manner in which they were carrying out their Union activity (representing other employees); it was because of his personal antipathy toward Verberkmoes' Union activities that Vergeront instigated an investigation of Verberkmoes' time records for his visit to the WERC on December 7; by docking Verberkmoes leave time for his visit to the WERC on December 7 and by not allowing him credit for his working lunch that day, the Respondents treated Verberkmoes differently than other exempt employees engaging in non-protected activity, thus reflecting animus; by failing to respond promptly and fully to Verberkmoes' and Klein's request for information about how DCF learned about Verberkmoes' visit to WERC on December 7, the Respondents demonstrated a desire to cover up the origins of their investigation of his time records, which further confirms that the investigation and the resulting docking of leave time were both a result of animus towards his Union activities. In addition, Verberkmoes suggests that, to the extent the evidentiary record is incomplete in showing that his Union activity was treated differently than similar non-protected activity, the record should be reopened, because he had been impeded in obtaining this evidence in a timely fashion.

We begin with the last point, i.e., the state of the evidentiary record as to differential treatment. As the Examiner found, Verberkmoes' claim that his excursion to the WERC on December 7 was treated differently for leave time purposes than similar non-work related excursions by other employees and his claim that he was treated differently as to the working lunch on December 7 is simply not sufficiently supported by record evidence. We are not persuaded by Verberkmoes' contention that he was thwarted in his ability to produce such evidence by the Respondents' failure to comply with his requests for information. The burden of producing evidence of an unfair labor practice is upon the complainant – in this case,

Verberkmoes. Whether or not the Respondents complied with informal requests for information that might have provided Verberkmoes additional evidence to support his claim, subpoenas are available for compelling the production of witnesses and evidence at Commission hearings. See ERC Rule 22.05, incorporating by reference ERC Rule 18.08(6)(d). As we have recently had occasion to comment, "litigants before the Commission, including those who are unrepresented, bear the ultimate responsibility for learning about the complaint process and being prepared to present their case during a hearing." MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 32139-B (WERC, 9/08) at 3. Accordingly, we have no basis for "reevaluating" or reopening the record in this matter in order to permit Verberkmoes to produce evidence of disparate treatment. The Examiner correctly found that there is little or no actual evidence that Verberkmoes was treated differently than other employees as to his leave time.

Regarding Verberkmoes' other contentions, we employ a somewhat different analysis than did the Examiner but reach the same conclusions. We first address Verberkmoes' claim that the Respondents retaliated against him in violation of Sec. 111.84(1)(c), Stats. Assuming Verberkmoes was engaged in Union activity in filing materials at the WERC related to the Harrsch litigation, then the Respondents directly penalized Verberkmoes for his concerted activity by docking him leave time for that activity. In such situations -- where an employer takes adverse action against an employee directly for concerted activity in the belief that misconduct has occurred in the course of that activity -- the nexus between the concerted activity and the adverse action is clear, making it unnecessary and impractical to explore the question of animus. Instead, the Commission employs the balancing test that is traditionally applied in cases alleging a violation of Sec. 111.84(1)(a), Stats: does the employer have a legitimate and overriding interest in enforcing its rule, even though the rule (and the ensuing discipline) intrude upon the employee's otherwise protected activity? CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03); STATE OF WISCONSIN, DEC. NO. 30340-B (WERC, 7/04); NEW BERLIN SCHOOL DISTRICT, DEC. NO. 31243-B (WERC, 4/06).

Applying that analysis, it is clear in this case that the Respondents (including Vergeront) had a good faith basis for questioning whether Verberkmoes had committed misconduct in the course of his activity on December 7 at the WERC, in that they believed he may have failed to take leave which they assert was required under their contract with the Union. Leave for union activity is generally governed by the collective bargaining agreement:

> It is well-established under the Municipal Employment Relations Act (MERA), the municipal counterpart to SELRA, that the collective bargaining law itself does not give employees a per se statutorily-protected right to union release time. ROCK COUNTY, DEC. NO. 30787-A (30787-A (WERC, 9/04) at 4, and cases cited therein. Instead, the right to be paid for time spent in such activities, and the conditions under which such paid leave will be provided, are mandatory subjects of bargaining. ID. ... The right to engage in union activity on work time is dependent on what the parties have bargained, because, as noted above, there is no statutory right to do so.

STATE OF WISCONSIN, DEC. NO. 31272-B (WERC, 9/07) at 20. Nothing in this record indicates that the contract's union leave provisions would have permitted Verberkmoes to use work time to file materials at the WERC. Indeed, Klein took 30 minutes of leave on that same date to accompany Verberkmoes in filing materials at the WERC. To the extent the contract is susceptible of an interpretation that would permit Verberkmoes to use work time for this activity, we note that Verberkmoes could and did file a grievance advancing that argument, and we generally defer to the grievance procedure for interpreting contractual rights, including rights to union leave. ID. at 13.

If the record showed that the Respondents routinely ignored or failed to enforce the Union leave rules, yet enforced them in this instance, such would undermine the Respondents' good faith as to Verberkmoes and undercut the lawfulness of Respondents' enforcing the rules here. Here, however, as discussed above, the record utterly lacks evidence to that effect. Accordingly, the Respondents did not violate the law in investigating and ultimately docking Verberkmoes' leave accruals for the time he spent at the WERC on December 7, 2009.

Reading his Complaint and his petition for review liberally, Verberkmoes also contends that certain of Vergeront's statements in his e-mails regarding the Harrsch and Hammes litigation constituted threats or intimidation that would have a chilling effect on stewards who were attempting to represent other employees in matters before the WERC and other state agencies and therefore would constitute an independent violation of Sec. 111.84(1)(a), Stats.[1] As noted in the Summary of Facts, above, Vergeront's remarks, uttered in the course of representing OSER in that litigation, included references to Verberkmoes and Klein as "perpetrators" and "jail house lawyers" who "obviously have too much time on their hands, time that should be spent on the state's work and not chasing 'windmills'…" Vergeront labeled the claims Verberkmoes and Klein were advocating in the Harrsch case as "slam dunk 'frivolous'" and "pure unadulterated frivolous conduct." Vergeront also threatened to pursue sanctions in the Harrsch matter and implied that, if Klein was intransigent in settlement talks regarding the Hammes matter, "memories [would] linger when it comes to reciprocity."

As the Examiner noted, a claim that such statements constitute an independent, non-derivative, violation of Sec. 111.84(1)(a), Stats., requires a showing that the conduct has a "reasonable tendency to interfere with, restrain or coerce employees" in the exercise of their lawful concerted activity. JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), AFF'D, 187 WIS. 2D 647 (CT. APP. 1994). The standard is an objective one, focusing on how a

[1] The Examiner dealt with the independent (1)(a) allegation in a footnote, because he deemed the claim not to have been "specifically alleged." We agree that the Complaint did not refer to Sec. 111.84(1)(a), Stats., nor, for that matter, did it refer to Sec. 111.84(1)(c), Stats. The Complaint did refer to violations of "111.82" as well as "111.84(2)(b)," and mentioned that there had been "coercion, retaliation, and intimidation of employee pursuing complaint rights at WERC." The Commission has stated that, "… where, as here, the substance of the complaint itself makes it apparent that a claim is being presented that falls within the jurisdiction of the Commission," and where no party is prejudiced by the lack of specificity, the Commission will not require strict compliance with pleading rules. WEST SALEM SCHOOL DISTRICT, DEC. NO. 32696-D (WERC, 10/09) at 4 n.1. Such is the situation here.

"reasonable person" would be affected by the employer's statements or conduct, rather than how any particular employee responded subjectively.

Applying this standard to Vergeront's blustery remarks, we note that accusations of frivolousness are commonplace in legal filings and would not appear intimidating or coercive to a "reasonable person" serving as an opposing party's representative in litigation. The same can be said of Vergeront's characterizations of Verberkmoes and Klein as "jail house lawyers" and "perpetrators," a bit of ad hominem that is tolerated in the zealous pursuit of advocacy. More troubling are Vergeront's comments regarding Klein's settlement posture in the Hammes matter, where Vergeront implied that Klein ought to be more conciliatory lest "memories linger." Viewed in isolation, this comment could convey a threat, but, in the fuller context supplied by this record, it is clear that Vergeront was simply reminding Klein that adversaries who meet regularly in litigation often develop relationships that are affected by the extent to which one accommodates the other regarding scheduling needs and settlement flexibility. In this context, the "threat" was not directed at Klein's job security or working conditions, but rather to inform Klein, as an advocate, that he could expect to receive "tit for tat" by the Respondents' advocates in such tactical matters. Again, such comments by advocates in litigation are commonplace and would not be intimidating or coercive to a "reasonable person" serving as an advocate.

For the foregoing reasons, we affirm the Examiner's conclusions that the Respondents did not violate Secs. 111.84(1)(a) or (c), Stats.

Dated at Madison, Wisconsin, this 17th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

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