STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT L. MATTSON, Complainant,

vs.

CITY OF WASHBURN, Respondent.

Case 23
No. 71888
MP-4744

Decision No. 35430-A

Appearances:

Robert L. Mattson, 27265 South Maple Hill Road, Washburn, Wisconsin, appearing on his own behalf.

Mindy K. Dale, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of Respondent City of Washburn.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant Robert L. Mattson filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the City of Washburn violated § 111.70(3)(a)8, Stats., by retaliating against Mattson because of his filing and pursuance of a January 19, 2011 grievance. The complaint is date-stamped December 14, 2012, but recorded as received on December 17, 2012.

On August 8, 2014, the City filed its answer and affirmative defenses.

On October 24, 2014, the Commission authorized Lauri A. Millot to make and issue Findings of Fact, Conclusions of Law and Order in the matter.

Hearing on the complaint was convened on November 14, 2014, in Washburn, Wisconsin. At hearing the parties agreed that § 111.70(3)(a)8, Stats., was inapplicable to

Mattson's complaint. Mattson clarified that he believed he was retaliated against by the City in violation of § 111.70(3)(a)1, Stats.

Mattson and the City were afforded until January 16, 2015, to file post-hearing briefs whereupon the record was closed. Mattson's wife sent the Examiner an email indicating that her computer system was not working. The Examiner, with affirmation from the City's counsel, allowed Mattson additional time to file his brief. On January 28, 2015, Mattson confirmed he did not intend to file a brief.

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

FINDINGS OF FACT

1. Complainant Robert L. Mattson (hereinafter "Mattson") was hired by the City on April 28, 1987.

2. Respondent City of Washburn (hereinafter "City") is a municipal employer with offices located at 119 Washington Avenue, Washburn, Wisconsin. At all times relevant herein, Scott Kluver was the City Administrator, Michael Decur was the Director of Public Works, and Ron Leino was the Public Works Foreman.

3. On February 14, 2011, Kluver directed the following memorandum to "Public Works Department Employees" on Public Works Department letterhead:

> Subject: Cemetery Operations
>
> Beginning in September, 2010, all responsibilities of the Cemetery Sexton position have been shared by DPW Mike Decur, Foreman Ron Leino, and Administrative Assistant Tammy DeMars.
>
> This distribution of responsibilities will continue until further notice. Other personnel will be assigned as necessary for assistance with Cemetery maintenance and burial duties.
>
> Other Department of Public Works personnel will perform work at the Cemetery only as directed by Mick Decur or Ron Leino. All phone calls or messages regarding Cemetery operations shall be immediately documented and referred to Mike Decur, or Ron Leino in Mike's absence.

> Your assistance and attention to procedures in this matter is appreciated.

4. On April 21, 2011, Arbitrator Steve Morrison issued an Arbitration Award wherein he found that the City had violated the parties' collective bargaining agreement when it terminated Mattson in 2010. The City was ordered to reinstate Mattson, issue back pay and make him whole.

5. On May 23, 2011, Kluver sent Mattson, with a copy to his Union representative, the following:

> Dear Mr. Mattson:
>
> In accordance with Arbitration Case 22 No. 70281 MA-14930, this letter is to notify you of your return to work date. You are directed to return to work at 7:00 a.m. on June 6, 2011. Please report to the Public Works Garage for your assignments at that time. You shall receive back pay when the calculations are finalized.
>
> With this decision, and the length of time that has past (sic), it is important for you to know that you will be treated like any other employee. You will be treated fairly by management, and in return you will be expected to be a productive, cooperative member of the staff. The same work rules that applied before remain in effect.
>
> Please know, however, that there have been some procedural changes that have taken place in your absence. All Cemetery Sexton duties are now shared by the Public Works Director Mike Decur, Foreman Ron Leino, and Administrative Assistant Tammy DeMars. This arrangement will continue. Other Department of Public Works Personnel will perform work at the cemetery only as directed by the Public Works Director, or the Public Works Foreman. All messages and phone calls related to cemetery operations shall be immediately documented and referred to the Public Works Director, or in his absence, the Foreman.
>
> It is understood that you currently hold the position of "Cemetery Sexton/Street Labor." Please know that while your duties and responsibilities will change as set forth above, you will continue

> to be paid at the "Cemetery Sexton/Street Labor" wage rate for the duration of the 2010-2011 collective bargaining agreement.
>
> If you have any questions regarding these matters, feel free to contact me.

6. The City and Teamsters Local 346 entered into a Side Letter of Agreement to effectuate Mattson's return to work. The Union executed the side letter on August 29, 2011, and the City on September 7, 2011. The side letter read as follows:

> This Agreement is entered into and between the City of Washburn ("City") and General Drivers, Local 346 ("Union").
>
> The parties hereby agree and stipulate to the following:
>
> 1. On April 19, 2011, Arbitrator Steve Morrison issued a decision in City of Washburn, Case 22, No. 70281, MA-14930 (Mattson Discharge) ordering that Mr. Mattson be reinstated and made whole for any and all losses suffered as a result of his termination.
>
> 2. Mr. Mattson was reinstated on June 6, 2011.
>
> 3. Mr. Mattson will be made whole for lost wages by taking the amount Mr. Mattson would have earned had he been continuously employed between September 3, 2010 and June 6, 2011, and subtracting the amount of unemployment compensation benefits which Mr. Mattson received during this period of time.
>
> 4. In the event that Mr. Mattson is laid off from his employment with the City of Washburn and his "base period" for a new benefit year does not reflect enough wages earned for Mr. Mattson to qualify for unemployment compensation benefits based on the period between September 3, 2010 through June 6, 2011, or benefits are less than they would have been had he remained continuously employed, the City agrees to work with Mr. Mattson and the Department of Workforce Development to insure that Mr. Mattson receives unemployment compensation benefits that would be reflective of his having been fully employed by the City of Washburn between September 3, 2010 and June 6, 2011.

5. This Agreement shall be non-precedential for any and all purposes.

6. This Agreement shall be binding and effective as of the date of its execution by the parties.

7. On September 2, 2011, Mattson was issued a written warning for causing damage to property outside City boundaries and for failing to report the incident properly. The warning included a review of the expectation that damage reports must be reported on the day of the occurrence.

8. On September 7, 2011, Decur sent Kluver the following memorandum:

Subject: Robert Mattson

On Tuesday, September 6, 2011, at 3:30 p.m. Robert Mattson submitted a Damage Report (copy attached) regarding damage to property which occurred earlier in the day (September 6).

After reviewing this form, I returned the form to Mattson at 7:00 a.m. this morning and asked him to "take a couple more minutes to correct the date and time and justify why the damage was not preventable". At that time the "Date" read "3-6-11", the "Time" read "?", and there was no explanation of "Was Damage Preventable?", only the word "No".

Mattson became very animated and irrational, and tried to explain why the damage was not his fault. I tried to explain what he should have done in this situation, but he continued his "rant". He then stated that he was getting the union involved in this, because he claimed that I "swore" at him. He called Pete Dagsgard into the room as a witness and continued this "rant". Finally, he stomped off with the form stating he would "fix it". Several minutes later, while I was on a phone call, he threw the form back on my desk and went off to work.

9. Mattson was issued a written warning on September 15, 2011, for "disregard for City equipment and property, private property, and lack of proper [PROPERLY] reporting damages."

On the same date, Decur sent Kluver the following memorandum:

> Subject: Robert Mattson Warning
>
> At 12:30 p.m. today (Thursday, September 15, 2011), I delivered the attached written warning to Robert Mattson, with Ron Leino present as a witness.
>
> Mattson questioned what this was for, and he refused to sign it and placed it on my desk. He again became very defensive and accused me of a "witch-hunt". When he persisted with this behavior, I told him to go back to work and to go to City Hall with any questions.
>
> I then asked Ron Leino to witness this delivery with his signature.

10. On December 12, 2011, the City Council voted to eliminate the Park/Street Laborer, Cemetery Sexton/Street Laborer, Water & Sewer/Street Laborer, and Office Assistant, Secretary/EMT positions effective January 1, 2012. Of the five positions eliminated, four were vacant and Mattson held the fifth.

11. By letter dated December 14, 2011, Kluver informed Mattson that effective January 1, 2012, he would be reclassified from Cemetery Sexton/Street Laborer to Equipment Operator/Street Laborer at the hourly rate of $17.41. The 2011 hourly rate for the Cemetery Sexton/Street Laborer position was $17.70.

12. The collective bargaining agreement between the City and the General Drivers Local No. 346, Duluth, Minnesota, General Employees expired December 31, 2011.

13. On January 25, 2012, Mattson was issued a written warning and restricted from operation of major equipment and the dump truck for use or abuse of equipment and for failure to report damage to City equipment, property, or private property.

14. Mattson received four weeks of vacation leave on January 1, 2012, and was credited with an additional 27 hours of vacation on April 28, 2012.

15. On August 28, 2012, Mattson was cutting grass with a side-bar mower and cut the plastic pole that protects the power wire. Mattson reported the damage the following morning to Decur following which Decur directed the following memorandum to Kluver:

> Subject: Employee Conduct – Robert Mattson
>
> On Wednesday, August 29, 2012, approximately 9:00 a.m., I had yet another "confrontation" with Bob Mattson. Mr. Mattson

> turned in a (sic) "Equipment/Property Damage Report" to me at 7:00 a.m. this morning, regarding damage he caused yesterday (August 28) while mowing with our side-bar mower. After discussing this with Foreman Ron Leino, we are restricting Mr. Mattson from operating any major equipment indefinitely.
>
> Bob Matson (sic) was assigned to do necessary landscaping work, with hand tools, at West End Park this morning. At approximately 9:00 a.m. he returned to the Garage, saying he had completed the first assignment. He questioned why he couldn't operate equipment, and he resented being blamed for everything that happens! As usual, he became very irritated and argumentative. I told him it was not going to be argued here and assigned him to clean equipment and garage facilities.
>
> This is yet another example of our ongoing problems with this employee's conduct, and it follows multiple Damage Report incidents and written warnings. Once again it emphasizes the need to address several major items:
>
> - Employee communication with supervisors
> - Deceit
> - Capability (and need for re-evaluation) of designated equipment operators
> - Employee efficiency, work ethic, and attitude
>
> I would like to meet with you at your earliest convenience to address this issue and discuss possible corrective action. Your assistance in this matter is greatly appreciated.

On the same date, Kulver issued Mattson the following two-day suspension for violating the following rules of conduct contained in the City Personnel Manual:

> …
>
> 5.9(b)(11) – The employee is incompetent, negligent, or inefficient in the performance of his duties. (Your high level of damage reports demonstrates incompetence and/or negligence.)
>
> 5.9(b)(15) – The employee, through culpable negligence or willful misconduct, has caused damage to public property or waste of pubic supplies. (Many of the recent incidents could have been prevented if reasonable care had been taken.)

> 5.9(b)(38) – The employee has engaged in conduct that is detrimental to Department morale. (Your inability to accept responsibility for your actions is creating an unpleasant work environment for your fellow employees.)
>
> …

The City had a discipline and grievance procedure available for employees to challenge discipline. Mattson did not file a grievance appealing the two-day suspension.

16. On September 13, 2012, Mattson received a written warning for misplacing his City keys.

17. On September 24, 2012, Leino directed the following email to Kluver:

> Subject: Grading Incident – Castle Drive
>
> On Thursday and Friday, September 20 and 21, 2012, I assigned Bob Mattson to grading of gravel roads in the City. Late in the afternoon of Thursday, September 20, Mattson was grading in the northern section of the City. He graded Grandview Blvd., which needed regrading on Friday, September 21. He also graded Castle Drive late Thursday or early Friday.
>
> On Friday, September 21, at approximately 11:30 a.m., I was inspecting roads and discovered a large rock, and the hole it had been pushed from, at the edge of the roadway on Castle Drive near Washington Avenue. Since Bob Mattson had left work at 11:00 a.m. (unscheduled comp time-off), I assigned Ross Lightner to repair the road and stabilize the boulder until it could be removed.

When Kluver learned of the Castle Drive incident, he placed Mattson on administrative leave with pay.

18. Mattson returned to work on October 8, 2012, and sustained a work-related injury. As of the date of the injury, Kluver had not decided whether he would discipline Mattson for the Castle Drive incident.

19. Mattson resigned his employment effective May 1, 2014.

20. The City eliminated the Cemetery Sexton/Street Laborer position for legitimate business reasons.

21. The City reduced Mattson's hourly wage effective January 1, 2012, consistent with his reclassification to the Equipment Operator/Street Laborer position.

22. The City calculated Mattson's vacation leave consistent with the expired collective bargaining agreement, past practice, and the City of Washburn personnel manual.

23. Decur monitored Mattson's activities and work execution more stringently than other Public Works Department employees. Decur was lenient when other Public Works Department employees failed to report damage to City property and was unaware of numerous instances of other Public Works Department employees damage to City property.

24. Kluver was regularly apprised of Mattson's activities through written memoranda addressing his behavior, work execution and involvement in damage to City property. Kluver did not monitor the activities of other Public Works Department staff. Other Public Works Department staff were subject to more lenient expectations relative to reporting damage to and reporting of City property.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following:

CONCLUSIONS OF LAW

1. Mattson was a "municipal employee" within the meaning of § 111.70(1)(i), Stats.

2. The City is a "municipal employer" within the meaning of § 111.70(1)(j), Stats.

3. The Examiner, pursuant to Wis. Admin. Code § ERC 12.02(5), conformed the evidence to the pleadings and amended the complaint by changing Mattson's § 111.70(3)(a)8, Stats., violation to §§ 111.70(3)(a)1 and 111.70(3)(a)3, Stats.

4. That Mattson engaged in protected concerted activity when he filed a grievance pursuant to the terms and conditions of a collective bargaining agreement in 2010. The City was aware of Mattson's protected activity.

5. There is a one year statute of limitation to file a prohibited practice complaint pursuant to § 111.07(14), Stats.

6. The complaint was received on December 17, 2012, and the one year statute of limitation period expired on December 17, 2012.

7. By its actions herein, the City did not retaliate when it eliminated the Cemetery Sexton/Street Laborer position and reduced Mattson's hourly wage effective January 1, 2012, and, therefore, did not violate § 111.70(3)(a)1, Stats.

8. By its actions herein, the City's supervision and discipline of Mattson, including the issuance of a two-day suspension, was motivated, in part, by hostility to his lawful, protected concerted activity in violation of §§ 111.70(3)(a)1 and 111.70(3)(a)3, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The City, its officers, and agents shall immediately:

1. Cease and desist from considering an employee's lawful, concerted activity when supervising and disciplining employees.

2. Take the following affirmative action, which will effectuate the purposes and policies of the Municipal Employment Relations Act:

a. Make Mattson whole by reimbursing him for the two days when he was unlawfully suspended.

b. Notify all employees employed by the City of Washburn by posting in conspicuous places in the City's offices and buildings where such employees are employed, copies of the notice attached hereto and marked "Appendix A." This notice shall be signed by the City Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of sixty (60) days thereafter. Reasonable steps shall be taken by the City to insure that this notice is not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

3. Mattson's allegations that the City violated §§ 111.70(3)(a)1 and 3, Stats., when it eliminated the Cemetery Sexton/Street Operator position, reclassified him to Equipment Operator/Street Laborer, and prorated his vacation leave based on his April 28 anniversary date are dismissed.

Dated at Rhinelander, Wisconsin, this 24th day of April 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____

Lauri A. Millot, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES OF THE CITY OF WASHBURN

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL immediately make Robert L. Mattson whole for all wages and benefits lost as a result of his two-day suspension in conformance with the Order of the Wisconsin Employment Relations Commission.

2. WE WILL NOT discriminate against any employees of the City of Washburn because of their having exercised their rights pursuant to the Municipal Employment Relations Act.

Dated this _____ day of _____, 2015.

CITY OF WASHBURN

_____
Scott Kluver, City Administrator

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint asserted violations of § 111.70(3)(a)8, Stats. At hearing, Mattson clarified that he believed he had been retaliated against by the City after he was returned to work pursuant to a grievance arbitration decision. The City understood that Mattson was asserting that he was retaliated against and argued against a violation of § 111.70(3)(a)1, Stats. in its brief. The City further challenged the Commission's jurisdiction as to a those allegations that occurred prior to December 16, 2011.

Because the Commission has held that, even when a complaint is filed under § 111.70(3)(a)1, Stats., "the appropriate paradigm for cases involving retaliatory or discriminatory adverse action lies in the four-element framework of Section (3)(a)3." *Clark County*, Dec. No. 30361-B (WERC, 11/2003). I therefore have conformed the evidence to the pleadings and amended the complaint by changing Mattson's § 111.70(3)(a)8, Stats., violation to §§ 111.70(3)(a)1 and 111.70(3)(a)3, Stats.

There is no question that Mattson engaged in protected activity when he successfully grieved his termination. Neither is there any dispute over the City's knowledge of the grievance. The issues before the Examiner are whether the decisions to eliminate the Cemetery Sexton/Street Laborer position; to reduce Mattson's hourly wage; and to deny Mattson vacation leave were motivated, in whole or in part, by that hostility and whether the City was hostile to Mattson through differential treatment.

Jurisdictional Challenges

Section 111.07(14), Stats., made applicable to prohibited practices arising under MERA by §111.70(4)(a), Stats., provides:

> 111.07 Prevention of unfair labor practices.
>
> * * *
>
> (14) 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.

Wisconsin Administration Code § ERC 10.06 provides:

> (1) COMPLETION OF FILING WITH THE COMMISSION. Except as otherwise specifically provided in the rules chapter applicable to the document involved, filing of a document with the commission is completed when the document and any

> associated filing fee is actually received by the commission at its Madison office during normal business hours by physical delivery, mail, fax or e−mail. The commission's normal business hours at all work locations are 7:45 AM to 4:30 PM, Monday through Friday, excluding legal holidays. E−mail communications to the commission shall be directed to the commission's central e−mail address.

Wis. Admin. Code § ERC 10.06.

The complaint in this case is date-stamped December 14, 2012, and Commission staff hand recorded payment as received on December 17, 2012. Since the complaint isn't filed until both the written complaint and fee are received and the date the fee was recorded is December 17, 2012, that shall serve as the date the complaint was filed.

Affirmative defenses are to be raised in the answer to the complaint. Wis. Admin. Code § ERC 12.03(3)(b). The City's answer, filed on August 8, 2014, raised the affirmative defense that the position elimination and wage reduction occurred outside the one year statute of limitation.

Mattson was first placed on notice that his position would be eliminated in his return to work letter dated May 23, 2011 from Kluver. While it was Kluver's intention to make this change upon expiration of the collective bargaining agreement, Kluver did not have the independent authority to take this action. On December 12, 2011, the City Council voted to reclassify Mattson's position from Cemetery Sexton/Street Laborer to Equipment Operator/Street Laborer, and Kluver informed Mattson of same by letter dated December 14, 2011. Mattson would have received the December 14, 2012, letter within two to three days; therefore, he knew or should have known that his position was being eliminated and salary reduced by Friday, December 16 or Saturday, December 17, 2012.[1] While it is possible that Mattson learned of the reclassification and salary reduction on December 16, 2011, there is no evidence in this record to reach this conclusion, thus the December 17, 2011 date shall be used. Mattson therefore had one year from December 17, 2011, to file his complaint. Mattson's asserted violations that his position was eliminated and his hourly wage was reduced are therefore timely.

Applicable Legal Standards

Examiner David Shaw, in *Milwaukee County (Sheriff's Department)*, Dec. No. 31428-A (WERC, 7/19/06) summarized the law with regard to retaliation and is relevant to this case. That decision set forth the following:

[1] Kluver testified that the general delivery time for mailing within the City of Washburn is two to three days. Tr.40-41.

Sec. 111.70(3)(a)1, Stats. provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Sec. 111.70(2), stats., referred to above, states:

> Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

In order to establish a violation of Sec. 111.70(3)(a)1, Stats., a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. WERC V. EVANSVILLE, 69 Wis. 2D 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

Sec. 111.70(3)(a)3, Stats. provides that it is a prohibited practice for a municipal employer:

> "3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment; but the prohibition shall not apply to a fair-share agreement."

In order to establish a violation of this section, a complainant must establish by a clear and satisfactory preponderance of the evidence all of the following elements: (1) the employee was engaged in lawful and concerted activities protected by MERA; (2) the employer was aware of those activities; (3) the employer was hostile to those activities; and (4) the employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 Wis. 2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2D 132 (1985); CITY OF MILWAUKEE, ET AL, DEC. NO. 29270-B (WERC, 12/98).

Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. *See* TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. *See* COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79).

It is irrelevant that an employer has legitimate grounds for its action, if one of the motivating factors was hostility toward the employee's lawful, concerted activity. *See* LA CROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's actions. *See* MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 35 Wis. 2D 540,

> 562 (1967). Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employee due to lawful, concerted activity will not be encouraged or tolerated. *See* EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis. 2D 132, 141 (1985).
>
> The Commission has concluded that in cases such as this, where the alleged violations are based upon alleged retaliation for engaging in lawful, concerted activity, it is appropriate to apply the traditional four-part analysis under Sec. 111.70(3)(a)3 to the alleged violation of Sec. 111.70(3)(a)1, as well:
>
> > Because retaliation for lawful, concerted activity inherently discourages other employees from engaging in concerted activity, a violation of Section (3)(a)3 is also a violation of Section (3)(a)1
> >
> > . . .
> >
> > In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees.
> >
> > . . .
>
> CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at p. 15.

Elimination of Cemetery Sexton/Street Laborer Position and Reduction in Pay

Mattson was terminated in 2009. He filed a grievance and, on April 21, 2011, Arbitrator Steve Morrison sustained the grievance. The City was ordered to return Mattson to work.

On its face, the elimination of the Cemetery Sexton/Street Laborer position was prompted by a legitimate business reason. Following Mattson's termination, the duties were divided and assigned to three different positions. In February 2011, before the grievance arbitration decision was issued, Kluver directed a memorandum to all Department of Public Works staff informing them that the three person division of responsibilities would continue

and that other staff could be assigned tasks at the cemetery. This division of labor was not specifically planned, but was likely the result of Mattson's absence, although in 2009 the City had communicated to Department of Public Works staff that it would be cross-training staff for cemetery work. Mattson returned to work on June 6, 2011.

Following the issuance of the arbitration decision and in the context of returning Mattson to work, the City informed Mattson that the post-Mattson termination distribution of cemetery duties would continue, that his duties and responsibilities would change due to the redistribution of cemetery duties, and that he would be paid the Cemetery Sexton/Street Laborer wage until the labor agreement expired. Both Mattson and the Teamsters Local 346 were provided this letter and, therefore, both knew or should have known that when Mattson returned to work, he would not be performing the Cemetery Sexton/Street Laborer job duties. Neither Mattson nor Teamsters Local 346 filed a grievance challenging the City's intended action nor did either challenge the City's compliance with the arbitrator's remedy.

Mattson asserts that since his position was the only one with an incumbent that was eliminated following expiration of the collective bargaining agreement, the City's motivation was retaliatory. The City maintains that its actions were prompted by the new-found Act 10 rights and its reorganization in February 2011. While it is clear that the job duties of the Cemetery Sexton/Street Laborer position were reassigned and documented in a memorandum dated February 14, 2011, that memorandum did not address the elimination of the position.

Of greater interest is the memorandum itself. Not only is the timing of the memorandum peculiar, but also the author and the letterhead. The February 2011 memorandum to the "Public Works Department Employees" regarding cemetery operations identifies Kluver as the drafter. The record is silent as to what, if anything, occurred in February to prompt such a memorandum, although the hearing before Arbitrator Morrison occurred on January 19, 2011. The memorandum appears to simply reduce to writing the current "distribution of responsibilities," but it is written by Kluver, not the Director of Public Works and it was prepared on Public Works Department letterhead. All of Kluver's other communications were prepared on City of Washburn letterhead. Why Kluver and not Decur would draft a memorandum to Public Works Department staff regarding job assignments and why Kluver's memorandum would be on Public Works Department letterhead rather than City of Washburn letterhead is illogical and cause for suspicion. Yet, even with this memorandum's oddity, it does not support an inference of retaliatory action since the reassignment of the cemetery responsibilities occurred long before the grievance arbitration award and were necessitated by Mattson's absence.

The grievance arbitration decision did not require that the City return Mattson to his previous position, but did order reinstatement and a make whole remedy. Make whole is designed to put the aggrieved in the same financial position that he would have been in had the termination not occurred. The collective bargaining agreement was in force through December 31, 2011, including the grievance procedure. Had Act 10 not allowed the City to

unilaterally eliminate the Cemetery Sexton/Street Laborer position and alter Mattson's hourly wage after the labor agreement expired, it is highly unlikely those actions would have occurred.

The facts do not support an inference that the City was motivated by hostility toward Mattson's protected concerted activities when it eliminated the Cemetery Sexton/Street Laborer position and paid him the hourly wage for the Equipment Operator/Street Laborer position he was reclassified to effective January 1, 2012.

Differential Treatment and Harassment

Mattson next asserts that he was harassed after he returned to work. Mattson cites the assignment of demeaning job duties, the issuance of letters of reprimand, the imposition of a suspension, and differential treatment as the basis for the harassment.

With regard to the assignment of demeaning jobs, Mattson asserted that he was directed to work in the rain when other Public Works Department employees were not and that he performed meter reading and street sweeping. There is corroboration that in one instance Mattson was assigned to work in the rain when other staff were not, although both Mattson and Mattson's witness, Barbara Zepczyk, testified to the Public Works Department staff being divided into those that received preferential work assignments and those that do not, irrespective of engaging in protected activity. As to the meter reading and street sweeping jobs, they are likely duties that other Public Works Department employees performed pre-2011 and while they may lack the independent decision-making authority and responsibility that Mattson held prior to his termination, they are legitimate work assignments.

Mattson was disciplined five times between when he returned to work in June 2011 and when he suffered an injury on October 2012, including four warnings, three of which were for damage to, abuse of, and disregard for City property; failing to report damage to City property and/or not completing the damage report in its entirety; and a two-day suspension for damage to power wire. It is undisputed that the City communicated its expectation that employees were expected to complete damage reports for all damage to City property on the date that the damage occurs. Mattson did not deny damaging City property as documented in the damage reports and discipline. Rather, he denied it was operator error and generally explained that the damage was due to the age or quality of the machinery. Mattson had grievance procedures at his disposal to challenge the disciplines since the collective bargaining agreement was in effect until December 31, 2011 and, thereafter, the City adopted a grievance procedure, but he did not avail himself to either of these dispute resolution venues.

The record establishes that following Mattson's termination, Kluver inserted himself into the management of the Public Works Department. In February 2011, he sent out a memorandum, on Public Works Department and not Administration letterhead, addressing work responsibilities. Once Mattson returned to work, Decur and Leino provided Kluver

memoranda reporting on Mattson's performance, attitude, and casualties relative to City equipment. Ex.15, 16, 20. And when the two-day suspension was issued to Mattson in August 2011, it was Kluver and not Decur that imposed the suspension. While Kluver explained that he was involved because the Public Works Director did not have the authority to suspend Mattson, this contradicts the City's personnel manual, Section 5.13, which provides:

…

> a. Any action on the part of any employee which is in violation of the orders of his supervisor of (sic) contrary to the Wisconsin statutes, City ordinances, or policies or rules of the City, but not serious enough to warrant immediate dismissal, may be disciplined by Suspension Without Pay for an indeterminate period. This authority is to be exercised by the Personnel Committee or the employee's supervisor. In the case of suspensions of any law enforcement officer, the procedures in Section 5.13 shall be followed.

…

The question is whether the City's micromanagement of Mattson was because of his lawful protected activity or due to his unprotected behavior. Given that all of Mattson's derelictions occurred after Kluver decided he would intervene in Mattson's supervision, I conclude is was due, in part, to his lawful protected activity. The City was fully aware of its obligation to treat Mattson the same as all other Public Works Department employees – it wrote just that to Mattson in its May 23, 2011, return to work letter. But when Mattson returned to work, the City had a system in place, or created it soon thereafter, for Leino to report to Decur who would memorialize Mattson's conduct to Kluver. This "system" existed only for Mattson. Had it been in place for all Public Works Department employees, Kluver and Decur would have been familiar with and/or had knowledge of most, if not all, of the 19 different damage incidents identified by Mattson.[2] While there is no question that Mattson challenged and/or failed to comply with Public Works Department rules, that he damaged equipment, and that he engaged in verbal confrontations with Decur, since the City was motivated, in part, by its hostility to Mattson's protected concerted activity, a violation of § 111.70(3)(a)3, Stats., is established.

[2] Kulver and Decur were questioned regarding the 23 incidents documented in Exhibit 29. These incidents are not dated, but there is sufficient evidence through the testimony of Decur, Zepczyk and Mattson to establish that the majority of the identified events occurred during Decur's employment and half since June 2011.

Incorrect Calculation of Earned Vacation Leave

Mattson asserts that he was denied 13 hours of vacation leave when he reached his 25 years of employment anniversary in April 2012.[3] Mattson maintains that the City inaccurately calculated vacation by prorating vacation based on the anniversary date.

The evidence establishes that the City prorates all employees' vacation leave based on their hire date. Mattson offered no evidence to suggest that this calculation method was different than any other employees and, in fact, he admitted that this calculation method was used during his first year of employment and for 23 years thereafter. There is no evidence to indicate that the City's method of calculating Mattson's vacation leave was impacted in any way by his protected concerted activity and as such this claim fails.

Remedy

Mattson resigned his employment with the City on May 1, 2014.

The record establishes that the City subjected Mattson to differential supervision and discipline in retaliation for having engaged in lawful protected concerted activity. The appropriate remedy is a cease and desist order, the posting of a notice, and reimbursement for two days suspension subject to the usual offsets.

Dated at Rhinelander, Wisconsin, this 24th day of April 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Lauri A. Millot, Examiner

[3] Mattson was unable at hearing to consistently identify the number of vacation hours or number of vacation days he believed the City had failed to credit him. He cited 2.67 days (Tr.24), a day and one-half (Tr.24) and 13 hours (Ex.32).