

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEMEEKA MITCHELL, Complainant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 2.0014
Case Type: COMP_PPS

DECISION NO. 35731-A

Appearances:

Temeeka Mitchell, 7010 W. Brentwood Avenue, Milwaukee, Wisconsin, appearing on her own behalf.

Amesia N. Xiong, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Health Services.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 24, 2015, Temeeka Mitchell filed a complaint with the Wisconsin Employment Relations Commission asserting that the State of Wisconsin, Department of Health Services had committed unfair labor practices within the meaning of §§ 111.84(1)(a) and (c), Stats. The State filed an answer denying that it had committed any unfair labor practices.

A hearing was held on November 5 and 6, 2015, in Milwaukee, Wisconsin, before Examiner Peter G. Davis. The parties presented oral argument at the conclusion of the hearing and a transcript of the proceedings was received on November 18, 2015.

Having considered the evidence and argument presented by the parties, I make and issue the following:

FINDINGS OF FACT

1. At all times material herein, Temeeka Mitchell was employed by the State of Wisconsin, Department of Health Services (hereinafter referred to as "State"). Mitchell left State employment in May 2015.

2. Mitchell and State employees Joann Anderson and Chauncey Montgomery filed civil service appeals with the Commission raising concerns as to the process used by the State when filling vacant positions. A hearing as to those appeals was scheduled. On January 16, 2015, Anderson overheard State supervisor Courtney Griffin-Dunn (who was unhappy about being a potential witness in the civil service proceeding) say that Anderson, Mitchell and Montgomery were "silly ass hos" and that their appeals were "bullshit." Griffin-Dunn's comments became a topic of conversation in the workplace, and Mitchell became aware of Griffin-Dunn's comments. The State investigated the Griffin-Dunn remarks but took no action. Griffin-Dunn was not Mitchell's supervisor and did not take any action against Mitchell.

3. Mitchell was a member of a labor organization.

4. The State was aware of Mitchell's activity described in Findings of Fact 2 and 3.

5. The State did not act out of any hostility toward Mitchell's activity described in Findings of Fact 2 or 3 when it denied her requests for a leave of absence, a change in work schedule and a promotion.

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

CONCLUSIONS OF LAW

1. By her conduct described in Finding of Fact 2, Mitchell was exercising her right under § 111.82, Stats., to engage in lawful concerted activity for the purpose of mutual aid or protection.

2. By her conduct described in Finding of Fact 3, Mitchell was exercising her right under § 111.82, Stats., to join a labor organization.

3. By the comments of a supervisor described in Finding of Fact 2, the State interfered with the exercise of Mitchell's rights guaranteed by § 111.82, Stats., and thereby committed an unfair labor practice within the meaning of § 111.84(1)(a), Stats.

4. By its actions summarized in Finding of Fact 5, the State did not commit unfair labor practices within the meaning of §§ 111.84(1)(c) or (a), Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following:

ORDER

The State of Wisconsin, its officers and agents shall immediately:

1. Cease and desist from interfering with employees' exercise of rights established by § 111.82, Stats.
2. Post the Notice found on the next page of this decision in the location(s) where Mitchell worked between January 16, 2015 and May 31, 2015.
3. Within twenty (20) days of the date of this Order, advise the Wisconsin Employment Relations Commission and Temeeka Mitchell in writing of actions taken to comply with this Order.
4. The complaint is dismissed in all respects aside from the unfair labor practice found in Conclusion of Law 3.

Dated at Madison, Wisconsin this 20th day of May 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

NOTICE

To comply with an Order of the Wisconsin Employment Relations Commission in Decision No. 35731-A, the State of Wisconsin, its officers and agents, hereby gives notice that it will cease and desist from making insulting remarks about State employee Temeeka Mitchell (or any other State employee) in response to the exercise of the statutory right to engage in lawful concerted activity as established by § 111.82 of the State Employment Labor Relations Act.

Director, Milwaukee Enrollment Services
State of Wisconsin, Department of Health Services

Posted this _____ day of _____, 2016.

THIS NOTICE SHALL REMAIN POSTED FOR THIRTY (30) CALENDAR DAYS FROM THE DATE IT IS POSTED AND SHALL NOT BE COVERED OR DEFACED.

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Alleged Violation of § 111.84(1)(a), Stats.

Section 111.84(1)(a), Stats., provides that:

- (1) It is an unfair labor practice for an employer individually or in concert with others:
 - (a) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82.

Section 111.82, Stats., gives State employees:

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

Here, Mitchell exercised those rights both by joining a labor organization and by engaging in lawful concerted¹ activity when she filed a civil service appeal.

When it is alleged that § 111.84(1)(a), Stats., has been violated, the question becomes whether the State's conduct, thru the actions of its managers and supervisors, had a reasonable tendency to interfere with the exercise of § 111.82 rights.² The inquiry is an objective one. If the conduct has a reasonable tendency to interfere, a violation will be found even if there was no intent to interfere and even if the employee was not deterred from exercising statutory rights.³

¹ While Mitchell filed an individual appeal as to whether nepotism had become a factor when the State filled vacant positions, she was thereby raising an issue of a general employee concern shared by and impacting other employees (as evidenced by the similar civil service appeals filed by Joann Anderson and Chauncey Montgomery and the contemporaneous discussion of the nepotism issue in the Milwaukee media). *See also Smith v. DOC*, Dec. No. 35748-A (WERC, 5/16).

² *WERC v. Evansville*, 69 Wis.2d 140 (1975). While that case involved alleged interference with rights under the Municipal Employment Relations Act (MERA), the statutory language at issue parallels that at issue here and, as noted by the Wisconsin Supreme Court in *Employment Relations Dept. v. WERC*, 122 Wis.2d 132, 143 (1985), in such circumstances "it would be illogical to apply a different test to MERA and SELRA merely because a different group of protected persons are involved (municipal employees versus state employees)."

³ *Beaver Dam Unified School District*, Dec. No. 20283-B (WERC, 5/84); *City of Brookfield*, Dec. No. 20691-A (WERC, 2/84); *Juneau County*, Dec. No. 12593-B (WERC, 1/77). While these cases involved alleged interference with rights under the Municipal Employment Relations Act (MERA), the statutory language at issue parallels that at issue here and, as noted by the Wisconsin Supreme Court in *Employment Relations Dept. v. WERC*, 122 Wis.2d 132, 143 (1985), in such circumstances "it would be illogical to apply a different test to MERA and SELRA merely because a different group of protected persons are involved (municipal employees versus state employees)."

Because Griffin-Dunn's remarks recited in Finding of Fact 2 were not directed to Mitchell, and because she was not Mitchell's supervisor, I conclude that there was no intent to interfere with Mitchell's § 111.82 rights. Further, it is apparent that the remarks did not deter Mitchell from continuing to exercise those rights by continuing to pursue her appeal. Nonetheless, particularly where the State did not disavow Griffin-Dunn's remarks and they became the subject of workplace conversation, I conclude that the remarks did have a reasonable tendency to interfere with, restrain or coerce the exercise of § 111.82 rights by Mitchell (and potentially other employees who heard about those remarks) and thus violated § 111.84(1)(a), Stats.

To remedy this violation, the State has been ordered to cease and desist and to post a notice.

Alleged Violation of § 111.84(1)(c), Stats.

Section 111.84(1)(c), Stats., provides in pertinent part that:

- (1) It is an unfair labor practice for an employer individually or in concert with others:

* * *

- (c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. ...

Mitchell alleges that the State has taken actions against her that have affected her "terms and conditions of employment," including denials of a requested leave of absence, a change in work hours and a promotion.⁴ She contends that when taking these actions, the State was motivated at least in part by hostility toward her lawful concerted activity. If the evidence presented persuaded me that the State was so motivated, multiple violations of § 111.84(1)(c), Stats., would be found. *Employment Relations Dept. v. WERC*, 122 Wis.2d 132 (1985). However, I am not so persuaded. Careful review of the evidence presented satisfies me that the State's actions⁵ were motivated by factors unrelated to Mitchell's union membership and/or the filing of her civil service appeal. Rather, the evidence establishes that the State acted, as to the requested schedule change and leave of absence, based on what it viewed as in the best interest of the Department of Health Services. Further, while there may have been flaws in the State's promotional process as it applied to Mitchell, any such flaws were not based on hostility toward her exercise of § 111.82 rights.

⁴ Both the denial of the promotion and of the request for a leave of absence occurred more than one year prior to the filing of the complaint on March 25, 2015. See §§ 111.07(14) and 111.84(4), Stats. However, the untimely nature of these allegations was not raised as an affirmative defense by the State and thus has been waived. *State of Wisconsin*, Dec. No. 28222-C (WERC, 7/98); *Stern v. WERC*, 296 Wis.2d 306 (2006).

⁵ As previously noted, Griffin-Dunn did exhibit hostility toward Mitchell's filing of the civil service appeal but she was not Mitchell's supervisor and played no role in any of the employment actions in dispute. Thus, no violation of § 111.84(1)(c), Stats., flows from Griffin-Dunn's comments.

Therefore, I have dismissed the § 111.84(1)(c), Stats., complaint allegations.

Dated at Madison, Wisconsin this 20th day of May 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner