STATE OF WISCONSIN PERSONNEL COMMISSION

DANIEL BRANSKI,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MILWAUKEE

Respondent.

Case No. 82-PC-ER-98

DECISION
AND
ORDER

NATURE OF THE CASE

On September 3, 1982, complainant filed a charge of discrimination with the State Personnel Commission alleging he had been retaliated against in violation of §101.055(8), Wis. Stats.

Daniel Branski was terminated from his employment with respondent on August 22, 1982. Branski alleges his termination was in retaliation for his perceived involvement in filing a safety complaint concerning certain procedures in the power plant.

Following an investigation, the Commission issued an Initial Determination dated January 17, 1983, which concluded that there was Probable Cause to believe that complainant was terminated for his perceived involvement in filing a complaint on occupational safety hazards in his workplace, in violation of the aforesaid statute. Thereafter, conciliation efforts were undertaken by the Commission and between the parties, but without success.

A hearing in the matter was held before Commissioner James W. Phillips on March 22 and 23, 1983 on the UW-Milwaukee campus in Milwaukee, Wisconsin. The parties completed their briefing schedule on May 12, 1983.

By Order dated November 9, 1983, Dennis P. McGilligan, Commissioner, was designated as hearing examiner in the matter by the Commission to replace Commissioner Phillips who had resigned his employment with the Commission on May 26, 1983.

FINDINGS OF FACT

1. The complainant, Daniel Branski, began working for the respondent University of Wisconsin-Milwaukee (UWM) in the power plant in August, 1981, as a limited term employe (LTE). Complainant initially had taken a competitive civil service examination for a Power Plant Operator 1 (PPO 1) position. When an Operator 1 position became available, complainant was hired to fill it on a full-time basis on December 13, 1981. He worked first in maintenance at the power plant and then, in March 1982, as a Power Plant Operator 1. Complainant was scheduled to complete his six months probationary period as a full-time employe on or about June 13, 1982.

2. In early March, 1982, complainant's sister-in-law Denise Lucente (also a PPO 1 in the power plant) filed an oral safety complaint with the Union representing certain classified power plant employes concerning a problem with acid leakage during the water softener regeneration process in the plant. The Union referred Lucente's complaint to the safety inspection department on the UWM campus. As a result, an inspection of the water softener and related equipment was conducted by a Union representative, the respondent's Director of Safety, James LaRose, David Barden, a supervisor in the plant and Sylvester Janczak, Superintendent of the power plant. On March 12, 1982, Superintendent Janczak issued a revised safety procedure

concerning regeneration of soft water. By memorandum dated April 2, 1983, Superintendent Janczak instituted the wearing of new safety uniforms by Operators during the regeneration process.

3. Lucente made the aforesaid oral safety complaint in her own name. The complainant did not join in her complaint nor did Lucente indicate at any time material herein that she was lodging the complaint on his behalf. The complainant did not request Lucente to file the safety complaint or in any way cause Lucente to lodge same. Finally, the complainant learned that Lucente had lodged her safety complaint only after the complaint had been filed.

4. By memorandum dated May 1, 1982, Superintendent Janczak requested a 3 month extension of the complainant's probationary period. In said memorandum, Janczak noted the complainant had failed tests on two aspects of his position and stated that he felt the complainant had "put no effort into learning the requirements of the job." (emphasis supplied) Nevertheless, Superintendent Janczak requested that the complainant be given "another three months to redeem himself. However, if after that time there is no change, I will ask that he be terminated." That request was reviewed by Barbara Horton, respondent's Assistant Director of Employment Administrative Services and Donald Melkus, respondent's Director of Physical Plant Services, and ultimately approved by Charles Grapentine, Administrator, State of Wisconsin Division of Personnel on June 8, 1982. During this review, both Horton and Melkus recommended to Janczak that the complainant instead be terminated. The aforesaid request was approved on the condition that the complainant receive one-on-one training and counseling during the extended probationary period in order to bring his performance to the

desired levels. However, the complainant did not receive such additional training or counseling during that period.

5. By letter dated August 4, 1982, Superintendent Janczak notified complainant that his employment as a PPO 1 was being terminated effective August 22, 1982. The termination letter stated that complainant's work performance was not up to standard, that he was unable to operate equipment properly, that he failed to follow written procedures, and that he was loafing. Said letter concluded that the above items were discussed with the complainant during his evaluations. Sometime prior to sending the above letter, Superintendent Janczak told complainant that he would be terminated and indicated that he might wish to transfer to another state job or seek work elsewhere.

6. No one from the Union or the safety inspection department of the respondent told Superintendent Janczak who filed the aforesaid safety complaint. The only person who ventured an opinion on the matter was David Barden who informed Janczak that he thought Denise Lucente was responsible for the complaint. Janczak treated this simply as an opinion. In fact, Janczak did not know who filed the safety complaint and suspected all fourteen of his employes equally as having filed the complaint.

7. Before the safety complaint was filed, the complainant's performance had been rated as average in all categories, and the only negative comments on his performance evaluation concerned his taking too much time on his breaks. From December, 1981, until March, 1982, the complainant worked as a maintenance employe within the general designation of PPO 1. As such, the complainant's job duties and responsibilities were not identical to those of a regular PPO 1. Prior to March, 1982, the complainant's performance evaluations were prepared by Superintendent Janczak in reliance

upon the observations of David Barden, the complainant's immediate, first-line supervisor. After March, 1982, the complainant's performance evaluations were prepared by Janczak (now complainant's immediate supervisor) from his first-hand observations of the complainant's work performance as a regular PPO 1.

8. After the safety complaint was filed, the complainant continued to receive average ratings in all performance categories, but the other comments on the evaluation became more negative. In April, the comments state that the complainant "has demonstrated that he cleans his area but takes the material and places it in someone elses area." The April comments also state that Branski "has a tendency to instill doubt in others' minds as to the current operating policies." In June, the comments note that the complainant failed several tests regarding his job performance and was given a 3 month extension on his probationary period. The June comments further indicate that the complainant changed shifts without authorization and received a written reprimand for same. During this entire period of time, Superintendent Janczak was concerned about complainant's progress in learning to do his job.

9. In March, 1982, Superintendent Janczak and the complainant got into a dispute over the keeping of certain inventories. As a result, Janczak sent the following memo to Branski: "You will be required to keep a running inventory of the boiler chemicals, testing solutions and supplies. Also an inventory of lubricating oil and greases. A copy of the inventory is to be given to me every two (2) weeks. The inventory should contain the following...." On or about March 30, 1982, the complainant submitted a chemical inventory form to Janczak which did not comply with the established inventory format and was late.

10. In early May, 1982, Superintendent Janczak tested the complainant on his ability to run certain equipment. Janczak found Branski's performance to be deficient in operating the No. 1 feedwater turbine, following procedures for checking the fuel-oil tank, operating the No. 2 boiler and starting the condensate pump turbine. The complainant admitted at the hearing having made certain operational errors or failing to know established procedures with respect to the above deficiencies. The complainant also testified that because Janczak was hovering over him at the time of the above tests, he became nervous. Written operational policies existed for the particular pieces of equipment on which the complainant was unable to satisfactorily perform. Moreover, some of those written policies were posted "on or near" the equipment itself.

11. By letter dated June 24, 1982, Superintendent Janczak reprimanded the complainant for changing shifts without authorization. The letter stated in material part as follows: "... As you have participated in these type of changes before, you are aware of the requirements and procedures. I find it difficult to understand why they were not followed... If you feel that this action was taken without just cause, you may appeal in accordance with the Provisions of Article IV of the Labor Agreement...." The complainant did not attempt to appeal the written reprimand noted above.

12. In late July, 1982, Superintendent Janczak determined that the complainant and one other Operator were not following the written procedures for the water softener regenerating process. This failure resulted in a "blow-out" with ruptures of the sulfuric acid line and damage to other equipment. It also resulted in a loss of cold, "air-conditioned" air to campus buildings as well as a substantial financial loss. The complainant's discharge was based, in large part, upon this incident. Denise

Lucente was also responsible for a "blow-out" and she was not terminated. However, there is no evidence in the record that she was a probationary employe at the time of such "blow-out." Other employes also caused "blow-outs" and were not terminated. Apparently those "blow-outs" were caused by fatigue not operator error.

13. On August 3, 1982, the power plant ran out of a chemical reagent for testing the "CR-481" unit, and no test could be run on that piece of equipment as required. The complainant had responsibility for inventorying and ordering adequate supplies of needed chemicals including the chemical reagent noted above.

14. The complainant never filed a safety complaint (oral or written) with the respondent, DILHR, or the Union concerning the acid leakage occurring during water softener regeneration or any other problem at the plant. The complainant did, however, make "suggestions" to Superintendent Janczak during the performance evaluations as to an alternative "splash guard" device which could be installed to minimize any damage caused by acid line leakage. The complainant also never refused to perform a task out of a perceived danger of serious injury or death while employed in the power plant.

CONCLUSIONS OF LAW

1. The complainant, Daniel Branski, is an employe within the meaning of §101.055(2)(b), Stats.

2. The respondent is a public employer within the meaning of §101.055(2)(d), Stats.

3. The Commission has jurisdiction of this complaint pursuant to §101.055(8)(b)(c) and §230.45(1)(g), Stats.

4. The complainant has the burden of proof as to all the issues.

5. The complainant has not sustained his burden of proof with respect to the matter.

6. The complainant did not engage in, nor did management perceive that he engaged in, statutorily protected activity within the meaning of §101.055(8)(a), Stats.

7. The respondent did not discharge the complainant from his position as a Power Plant Operator 1 at the University of Wisconsin-Milwaukee in violation of §101.055(8)(a), Stats., with respect to actual or perceived reporting of safety violations.

OPINION

The parties stipulated at the prehearing conference to the following issue:

> Whether the employer discharged the complainant from his position as a Power Plant Operator 1 at the University of Wisconsin-Milwaukee in violation of §101.055(8)(a), Wis. Stats., with respect to actual or perceived reporting of safety violations?

The complainant alleges the respondent's termination of him as a Power Plant Operator 1 was in retaliation for complainant's having initiated certain safety violation complaints. The respondent takes the opposite position.

The Commission derives its jurisdiction over complaints of discrimination pertaining to occupational safety and health via §§101.055(8)(b)(c) and 230.45(1)(g), Stats. (1981). The latter of these two subsections provides that the Commission shall "receive and process complaints of discrimination pertaining to occupational safety and health under §101.055(8)."

It seems clear that increased safety and improved health of employes in the workplace is a goal of the State of Wisconsin. In Section 101.055(1), Stats., the legislature declared as follows: "It is the intent of this

section to give employes of the state, of any state agency and of any political subdivision of this state rights and protections relating to occupational safety and health equivalent to those granted to employes in the private sector under the Occupational Safety and Health Act of 1980...." To ensure that said process functions effectively, Section 101.055(8)(a), Stats., accords to every employe several rights, the exercise of which may not subject that employe to discharge or other forms of discrimination. Section 101.055(8)(a), Stats., provides in its entirety:

> (a) No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request with the department, instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercised any other right related to occupational safety and health which is afforded by this section.

Because no disputes have been processed to final decision by the Commission in this area to date, this case is one of first impression for the Commission. Therefore, it is important initially to set out the analytical framework upon which the Commission is going to rely in making decisions on this subject.

Since a violation of Section 101.055(8)(a), Stats., constitutes a form of discrimination, procedural guidance may be found in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S.Ct. 1817 (1973). In McDonnell-Douglas, the U.S. Supreme Court set forth the basic allocation of burden of proof and order of presentation of evidence in a Title VII case where an individual alleges discriminatory treatment in employment. First, the complainant must establish a prima facie case of discrimination, in response to which the respondent must articulate a legitimate, nondiscriminatory reason for its actions. If the employer presents such a response,

the complainant must show the response was a pretext for discrimination. The burden of persuasion is on the complainant throughout. Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089, 25 FEP Cases 113 (1981).

In retaliation cases, the complainant's prima facie case must establish: (1) statutorily protected participation by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two. The causal connection consists of "evidence showing that a retaliatory motive played a part in the adverse employment action..." See Smith v. UW, 79-PC-ER-95 (6/25/82), and cases cited therein. The Commission adheres to the approach followed by the U.S. Supreme Court in Furnco Construction Corp. v. Waters, 98 S. Ct. 2943, (1978), in requiring the complainant as part of the prima facie case to introduce evidence sufficient merely to raise an inference of retaliatory motives.

Once the prima facie case has been established, the employer must articulate a non-discriminatory rationale for the action taken. The complainant then must show that this articulated rationale was in reality a pretext for unlawful discrimination. In cases involving mixed motives by the employer, a complainant succeeds in proving discrimination if he or she shows that a retaliatory motive played any part in the decision. See Smith v. UW, supra, at pp. 6-7, and McDonald v. Santa Fe Trail Transport Co., 96 S.Ct. 2574, 2580 n. 10 (1976).

As a result, the Commission initially turns its attention to the question of whether the complainant has established a prima facie case that the respondent terminated him as a Plant Operator in retaliation for complainant's having initiated certain safety violation complaints. In

this regard, the complainant must first prove that he engaged in statutorily protected activity.

Section 101.055(8)(a), Stats., noted above, provides that a public employer may not terminate a public employe "because the public employe filed a request with the department, instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercises any other right related to occupational safety and health which is afforded by this section." It is undisputed that the complainant did not file any request with the Department of Industry, Labor and Human Relations related to occupational safety and health under Section 101.055, Stats., prior to his discharge. It is also undisputed that the complainant did not testify in any proceeding or refuse to perform a task for health or safety reasons within the meaning of the aforesaid provision. An issue remains whether the complainant instituted or caused to be instituted any action or proceeding or exercised any other right related to occupational safety and health within the meaning of the above section.

With respect to the above, the respondent argues that the first issue before the Commission is whether or not the complainant has proper legal standing to entitle him to the protections afforded by section 101.055(8)(a), Stats. The respondent takes the position that the complainant does not possess such standing and articulates a number of arguments in support thereof.

In rebuttal the complainant maintains that he was the motivating force behind the "common concern" of other employes relating to occupational safety and health matters in the power plant; and, in particular, caused

Denise Lucente to file an oral safety complaint with the union concerning a problem with acid leakage during the water softener regeneration process in the plant. The record, however, does not support such a conclusion. In this regard the Commission notes, assuming arguendo that oral complaints are the kind of protected activities for which public employes cannot be disciplined or discharged under the above statute, that the complainant was not involved in any way with the filing of Lucente's oral complaint. Lucente acted completely on her own while the complainant learned about the safety complaint only after it was filed. Nor is there any persuasive evidence that the complainant somehow "caused" Lucente to file her safety complaint. The most that can be said here is that the complainant and Lucente talked about health and safety matters while on the job like other employes of the respondent. However, this evidence of "shop talk" falls short of the proof required to establish that the complainant caused Lucente to file her safety complaint.

The complainant also maintains that, irrespective of what he actually did, the respondent believed he was involved in the filing of the oral safety complaint and took action against him as a result thereto. (The Wisconsin Supreme Court in Dairy Equipment Co. v. ILHR Department, 95 Wis. 2d 319 (1980) held that an employe's perceived handicap (one kidney) must be interpreted as being within the meaning and intent of the Fair Employment Act; and consequently, that the employe was entitled to protection against discrimination based on this type of perceived handicap, pursuant to the Act.) The evidence on this point, however, is at best mixed. In this regard, the Commission notes that the complainant presented testimony by himself and Lucente supporting the proposition that Superintendent Janczak thought complainant was involved in the filing of the safety

complaint. The respondent, on the other hand, presented at least equally persuasive evidence that Superintendent Janczak did not know who filed the safety complaint and did not suspect the complainant any more than other employes under his management. Therefore, the complainant did not sustain his burden of proof as to this point.

Based on the above, the Commission finds that the complainant does not have standing to invoke the protection of Section 101.055(8)(a), Stats., because he did not engage in protected activity within the meaning of the phrase "instituted or cause to be instituted any action or proceeding relating to occupational safety and health matters...." The only question remaining is whether the complainant exercised any other right related to occupational safety and health covered by the statute. In this context, the complainant contends that he talked with Superintendent Janczak about safety matters and encountered hostility and ill-treatment over same.

It is true that the complainant made "suggestions" to the respondent concerning an alternative "splash guard" device which, if installed, could minimize damage from acid leaks. However, there is no persuasive evidence in the record that these "suggestions" led to the filing of Lucente's complaint. Nor does the statute expressly provide that his "suggestions" come within the meaning of the phrase "exercised any other right related to occupational safety and health" contained in the above section. Assuming arguendo, however, that said comments are protected activity within the meaning of the statute, the complainant's case still must fail.

In this regard (or using this approach), the Commission finds that the complainant has established a prima facie case of retaliation. First, he has engaged in protected activity by making "suggestions" regarding plant safety. Secondly, the complainant has shown adverse employment action by

the respondent in his termination. Finally, the complainant has established a causal connection between the two in that the events leading up to his termination -- deteriorating employe evaluation reports, Superintendent Janczak's increasingly critical attitude and behavior toward the complainant's work performance, and the extension of his probation -- at least raise an inference of retaliatory motives since they all occurred at the same time or after the "suggestions" were made.

Having established a prima facie case, the burden shifts to the respondent who must articulate a legitimate, non-discriminatory reason for its action. As noted in Findings of Fact Numbers 4, 5, and 7 through 13, the respondent has presented a proper reason for terminating the complainant -- his poor work performance. Since the respondent presented such a response, the complainant must show the response was a pretext for discrimination.

In the McDonnell-Douglas framework, a complainant succeeds in proving discrimination if he or she shows that the employer acted out of mixed motives. In other words, the complainant must establish that discriminatory motives played a part in the adverse employment action. Smith v. UW, supra, at p. 7. For the reasons listed below, the Commission finds that the complainant did not succeed in showing the respondent terminated him in part due to retaliation over his actual or perceived reporting of safety violations.

First, as noted above, the complainant did not show that the respondent knew or thought the complainant was involved in the filing of the oral safety complaint. However, assuming arguendo that the complainant has met this burden, the complainant still has not established that the respondent terminated him as a result thereto. For example, the complainant argues

that his employe evaluations began to deteriorate soon after he made the aforesaid "suggestions" and Lucente filed her safety complaint. While this fact is true, it is equally plausible to conclude complainant's evaluations worsened due to the fact that he was doing different work and that Superintendent Janczak was now his immediate supervisor and wrote his reports based on first-hand knowledge of the complainant's work performance which he (Janczak) was not satisfied with. The complainant also argues respondent gave him more tests than other employes in an attempt to get him. In so far as the respondent was concerned about the complainant's progress in learning his job and the complainant's repeated test failures, the respondent's testing approach with complainant only seems reasonable. Finally, the complainant maintains that Superintendent Janczak extended his probation in order to better document a case against him for termination. The record, however, supports an opposite conclusion. Janczak actually was trying to give the complainant a second chance at passing his probation. This observation seems especially valid since both Barbara Horton and Donald Melkus recommended to Janczak that the complainant instead be terminated. Even when Janczak informed the complainant that he would eventually be terminated, he tempered this information with the suggestion that the complainant might want to try to transfer to another job in state service or look for work elsewhere. Hardly, in the opinion of the undersigned, the attitude of a person out to get the complainant as alleged by the complainant.

Based on all of the above, and absent any persuasive evidence to the contrary, the Commission finds that the answer to the issue as stipulated to by the parties is NO, the respondent did not discharge the complainant from his position as a Power Plant Operator 1 at the University of

Wisconsin Milwaukee in violation of §101.055(8)(a), Stats., with respect to actual or perceived reporting of safety violations.

ORDER

In view of the foregoing, it is the Commission's Order that the complaint filed in the instant dispute is hereby denied and the matter is dismissed.

Dated: February 29 [1984]

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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