

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ROSANN HOLLINGER,
Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN - MILWAUKEE,
Respondent.

Case No. 84-0061-PC-ER

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ROBERT GERTSCH,
Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN - MILWAUKEE,
Respondent.

Case No. 84-0063-PC-ER

* * * * *

INTERIM
DECISION
AND
ORDER

NATURE OF THE CASE

These are complaints of retaliation under Subchapter III of Chapter 230, Stats., ("Whistleblower" law) which are before the Commission on respondent's "motion to dismiss or in the alternative for order of no probable cause" filed April 23, 1985. The parties have filed briefs on said motion.

Decision

The Whistleblower Law became effective on May 11, 1984. See, 1983 Wis. Act §409. According to the initial determination of "probable cause" dated April 8, 1985, the acts of disclosure (or perceived disclosure)

occurred prior to that effective date. The initial determination addressed only those alleged acts of retaliation which occurred after the effective date, reasoning that the Commission would lack the authority to deal with any acts occurring before then. At this stage of the proceeding, no party is asserting the Commission has jurisdiction over any alleged acts of retaliation prior to May 11, 1984.

The respondent's argument on jurisdiction was set forth in its initial memorandum as follows:

The complainants bring these two actions under Subchapter III of Wisconsin Statute, Chapter 230, the so-called "Whistleblower Act" (hereinafter "the Act"), claiming retaliation by respondent because of their disclosure of certain information. This statute protects the employee for [sic] information disclosed in accordance with Wis. Stats. sec. 230.81. Since the Act became effective May 11, 1984 and the disclosures took place prior to the effective date not in accordance with the Act, they are not afforded the protection of the Act. Unless expressly stated in the legislation, newly enacted laws are not applied retroactively. See State v. ILHR Dept., 101 Wis.2d 396, 403 (1981) citing Hunter v. School District Gale-Ettrick-Trempealeau, 97 Wis.2d 435, 442-43 (1980). Accordingly, a prima facie case has not been shown because the disclosure would have to have been made under a statute which was nonexistent at the time. Therefore, the Commission should grant this motion to dismiss for lack of subject matter jurisdiction.

The Commission cannot agree that application of the law to alleged acts of retaliation which occurred after its effective date, but which related to disclosures which occurred before its effective date, would constitute a retroactive application of the law.

The general law in this area was discussed in Metro. Sew. Dist. v. Chicago, M., St. P. & P.R.R., 69 Wis. 2d 387, 409, 230 N.W.2d 651 (1975), where the railroad argued in effect that a statute which became effective in 1872 could not be retroactively applied because the bridge in question had been built in 1863. The Supreme Court rejected this argument, citing 82 C.J.S. Statutes, p. 980, sec. 412:

... a statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites for its action is drawn from time antecedent to its passing, but is retroactive only when it is applied to rights acquired prior to its enactment. See also: 73 Am Jur. 2d Statutes, p. 486, sec. 348.

In the Lincoln Creek case, as will be discussed below, the railroad has no right to obstruct the stream at,¹ common law, and hence is not deprived of any right.

It is difficult to see how application of the law to alleged retaliation which occurred after the effective date of the law, but which concerned disclosures which had occurred before that effective date, could be said to impinge on rights acquired by respondent prior to May 11, 1984. Even if it were assumed that the respondent had some arguable, tangible right in this connection prior to May 11, 1984, it is questionable as a substantive matter whether such an arguable right would not be subordinate to complainants' constitutionally-secured rights of free speech, so that, to parallel the Metropolitan Sewage District case, it would be concluded that respondent had no right to impinge on complainants' constitutionally-protected rights to free speech even before effectuation of the whistleblower law.

If an application of the statute to alleged retaliatory acts after May 11, 1984, in connection with disclosures prior to May 11, 1984, would not be considered retroactive, then there is no presumption against a construction that leads to that result. However, the question remains whether the statutory language itself provides such coverage.

¹ See also Wickard v. Filbrun, 317 U.S. 111, 131-133, 63 S. Ct. 82, 92-93, 87 L.Ed. 122 (1942), which held that a law was not invalidly retroactive with respect to a wheat crop then seeded but not harvested, because of changed definitions and increased penalties, because the penalties did not become due until threshing, which occurred after enactment of the law.

Section 230.80(8), Stats., provides, inter alia, as follows:

'Retaliatory action' means a disciplinary action taken because of any of the following:

(a) The employe lawfully disclosed information under §230.81 or.... (emphasis supplied)

With respect to the underscored language, the word "disclosed" is not explicitly modified by any language that would limit the date of disclosure -- e.g., it does not say "disclosed after the effective date of this law." However, it may be argued that the word "lawful" means that the disclosure must have been made under the existing statutory framework set forth in §230.81, Stats. However, it also could be interpreted as meaning simply that the disclosure, to be protected, must have satisfied the necessary elements set forth in §230.81 at whatever point in time it was made.

It may be helpful to consider a hypothetical. Assume the legislature passed a law which prohibited the sale of certain items "unless lawfully manufactured in accordance with §555.55, Stats." Assume that section 555.55 was concurrently enacted and provided that the items had to have a certain tensile strength, load-bearing capacity, etc. If a company could market items that met all the specifications set forth in §555.55, could it be said it was in violation because the items had been manufactured before 555.55 was enacted and the legislature intended that only items manufactured in compliance with the existing statute could be sold? On the other hand, could it be said that if the company sold items manufactured before the effective date of the legislation which did not meet the specifications contained in §555.55, that it was not in violation because at the time of their manufacture the items were not legally proscribed? It would seem the answer to both questions clearly would be "no."

The Commission is guided in its approach to this matter by the "liberal construction" language applicable to Subchapter III of Chapter 230.

Section 230.02, Stats., states: "Statutes applicable to this department shall be construed liberally in aid of the purposes declared in §230.01." The whistleblower law clearly applies to the "department."² One of the specific "purposes declared in §230.01" is, inter alia:

It is the policy of this state to encourage disclosure of information under subch. III and to ensure that any employe employed by a governmental unit is protected from retaliatory action for disclosing information under subch. III.

This policy of encouraging disclosure and protecting employes would be furthered by a construction that would extend protection to an employe who made a disclosure before the effective date of the act and alleges he or she was retaliated against after that date.

The second part of the respondent's motion seeks to have the Commission reverse the initial determination of no probable cause because it is premised on what it characterizes as certain errors of law:

On page 24 of the Initial Determination, the Equal Rights Officer states, "[A]n admission of doubt regarding an employee's loyalty after disclosure of certain information is no different than an admission of retaliation." To equate an opinion of disloyalty with an admission of retaliation is clearly erroneous. Court have recognized the right of an employer to discharge an employee for disloyalty even after the employee has claimed that the employer violated section 704(a) of Title VII of the Civil Rights Act of 1964 which prohibits retaliation. Moze v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984); Novotny v. Grate American Federal Savings and Loan Association, 539 F.Supp.437 (W.D.PS 1982); Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976). See also NLRB v. Red Top, Inc., where the court stated that "the bounds of protected concerted activity do not include a privilege of disloyal and insubordinate conduct.

In the Commission's opinion, the investigator's statement quoted above has to do with a question of fact and not of law. The best way to resolve this question is by a hearing on the merits, which is what follows an

² "'Department' means the department of employment relations." §230.03(9), Stats. It is a "governmental unit" pursuant to §230.80(4), Stats., to which the whistleblower law applies.

initial determination of "probable cause." See §230.85(2), Stats. If the Commission agreed with the respondent's assertion that the investigator erred in his analysis of this point, an issue which it does not now reach, and to order a "no probable cause" determination, then the complainants presumably could appeal that determination and be entitled to a de novo hearing on the probable cause issue. If they prevailed on this issue, they then would be entitled to another hearing on the merits. Such a proliferation of proceedings is not conducive to the legislative policy underlying subchapter III of Chapter 230.

The respondent also argues the initial determination used an improper legal analysis for a mixed motive situation, that it should have followed the same approach indicated for circuit court proceedings in §895.65(3), Stats., and that it erroneously failed to assess whether the employer's proffered reasons were pretextual.

Even if the Commission agreed with the respondent's arguments concerning the proper analysis to use in a mixed motive case under Subchapter III of Chapter 230, an issue which it does not now reach, it is important to note that the initial determination did in fact deal with the pretext question notwithstanding its conclusion concerning mixed-motive analysis:

Although respondent states a number of reasons for the actions taken against complainants, some of which may be legitimate, there need only be evidence that a retaliatory motive played a part in the adverse employment action. See Smith v. UW-Madison, Case No. 79-PC-ER-95, Personnel Comsn., (6/25/82) at p. 5. Even so, there is still enough evidence to infer that the remaining legitimate reasons given by respondent are pretextual. (emphasis supplied)

In this context, the respondent's disagreement with the initial determination comes down to a disagreement with the nature and findings of the investigation. The respondent argues that the equal rights officer failed to "...interview such disinterested third parties as the

complainants' former nonsupervisory co-workers. Their testimony would have shown that the non-retaliatory reasons given were not pretextual." Again, these kinds of matters are best addressed at a de novo hearing on the merits.

ORDER

The respondents' motion to dismiss or in the alternative for order of no probable cause filed April 23, 1985, is denied.

Dated: August 15, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

AJT:jmf
ID9/2

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