STATE OF WISCONSIN PERSONNEL COMMISSION

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KENNETH VANDER ZANDEN,          *
                                *
               Complainant,     *
                                *
v.                              *
                                *
Secretary, DEPARTMENT OF        *
INDUSTRY, LABOR AND HUMAN       *
RELATIONS,                      *
               Respondent.      *
                                *
Case No. 84-0069-PC-ER          *
                                *
* * * * * * * * * * * * * * * * *
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FINAL DECISION AND ORDER

This matter is before the Commission for consideration of a proposed decision and order, a copy of which is attached hereto. The Personnel Commission, having considered the parties' arguments and objections, adopts the following as its Final Decision and Order in the instant matter:

1. The section of the Proposed Decision and Order entitled Nature of the Case.

2. The section of the Proposed Decision and Order entitled Findings of Fact.

3. The section of the Proposed Decision and Order entitled Conclusions of Law with the exception that Conclusions 4 and 5 are deleted and the following language is substituted:

"4. Complainant has not satisfied his burden.

5. Respondent did not retaliate against the complainant in violation of subch. II, ch. 230, Stats., with respect to the limitation on contacts with the Oshkosh Job Service Office."

4. The section of the Proposed Decision and Order entitled Decision with the following exceptions:

a. The fifth sentence of the first paragraph on page 12 (beginning with the phrase, "As will be discussed below,...") is deleted and the following language is substituted:

"Respondent's action in this case does not fall under any of the specific transactions enumerated in subsections (a), (b), (c), and (d)."

b. The portion of the Decision section beginning on page 15 and continuing to the end is deleted and the following language is substituted:

"There is a rule of statutory construction (the doctrine of ejusdem generis) which provides that where specific words follow a general term, the general term is applied only to things that are similar to those enumerated. Swanson v. Health & Social Services Department, 105 Wis. 2d 78, 85 (Ct. App. 1981), citing C. Sands, 2A Statutes and Statutory Construction, sec. 41.17, at 103 (1973).

The statutory definition under consideration here equates "disciplinary action" with an action having the effect of a penalty, and then includes a long series of examples: dismissal, demotion, transfer, removal of any assigned duty, refusal to restore, suspension, reprimand, verbal or physical harassment, reduction in base pay, denial of education or training (if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action), reassignment, and failure to increase base pay (except with respect to a discretionary performance award). The general term

"penalty" must be interpreted in the context of the specific terms used within the definition, each of which has a substantial or potentially substantial negative impact on an employe. The same cannot be said of the limitations Mr. Marty imposed on complainant's contacts with the Oshkosh Job Service Office, particularly in view of the fact that the duties and responsibilities of complainant's position did not necessitate frequent contacts with such office and Mr. Marty's limitations did not prevent but only rerouted such contacts. Therefore, while the Commission does not disagree with the findings set forth in the proposed decision, it can not conclude that the limited restrictions on complainant's activities set forth in the findings meet the statutory definition of "disciplinary action."

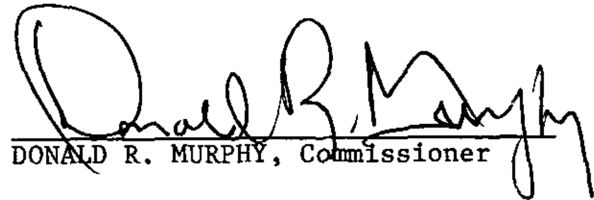
As a result, the Personnel Commission concludes that there was no "disciplinary action" within the meaning of §230.80(2), Stats., and therefore respondent did not violate Subch. III, ch. 230, Stats. In view of this conclusion, a discussion of the issue of pretext would serve no useful purpose."

5. The Proposed Order is deleted and the following is substituted:

"ORDER

This complaint is dismissed. Pursuant to s. 230.85(3)(b), Stats., the respondent shall insert a copy of the final decision and order in the complainant's personnel file."

Dated: Aug 24, 1988 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner

LRM:jmf
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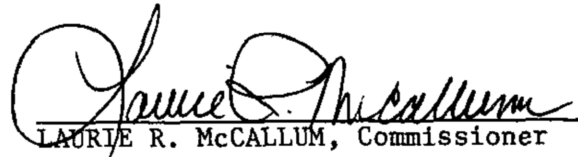
LAURIE R. McCALLUM, Commissioner

Parties:

Kenneth Vander Zanden
142 West Greenfield Drive
Little Chute, WI 54140

John Coughlin
Secretary, DILHR
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STATE OF WISCONSIN PERSONNEL COMMISSION

KENNETH VANDER ZANDEN, Complainant, v. Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, Respondent. Case No. 84-0069-PC-ER	PROPOSED DECISION AND ORDER

NATURE OF THE CASE

On July 2, 1984, complainant Kenneth Vander Zanden filed a charge of discrimination alleging that respondent retaliated against him by imposing restrictions that made it difficult for him to perform his assigned responsibilities in violation of Subch. III, Ch. 230, Stats. (The Whistleblower Law). On July 20, 1984, the respondent moved to dismiss the complaint on the following grounds:

> DILHR hereby moves to dismiss this complaint on the grounds that it does not come under §§230.80 to 230.89, Stats. Specifically, the individual named in the complaint (Walter Marty) has no supervisory relationship to the complainant.
>
> * * *
>
> I submit that Mr. Marty is simply not an appointing authority, agent of an appointing authority or supervisor under §230.83(1), Stats., in terms of his relationship to Mr. Vander Zanden. I would not be making this objection if the complaint was directed at the DILHR Secretary or one of Mr. Vander Zanden's supervisors, but the allegations are directed only at Mr. Marty.

On September 12, 1984, the Personnel Commission issued an Interim Decision and Order, denying the motion to dismiss on the basis that the plain language of the statute did not require that the agent of the appointing

authority, in this case Walter Marty, be in the supervisory chain over the complainant.

On March 25, 1985, the complainant amended his complaint to allege that respondent also retaliated against him by reassigning him, by not providing the same reassignment benefits as other employes, and by not selecting him to fill various vacant positions.

On December 20, 1985, Kurt M. Stege, Hearing Examiner, issued an Initial Determination which held, in relevant part, as follows:

> 3. There is Probable Cause to believe that respondent retaliated against the complainant with respect to the limitation on contacts with the Oshkosh Job Service office.
>
> 4. There is No Probable Cause to believe that respondent retaliated against the complainant with respect to the following actions:
> a. Complainant's reassignment to the Milwaukee office;
> b. Complainant's non-selection for any of six vacant positions in the Fox Valley Job Service office;
> c. Establishing the relocation benefits available to the complainant as a consequence of reassigning him to Milwaukee.

Complainant did not appeal the finding of "no probable cause" in regards to the reassignment and non-selection actions. Complainant and respondent attempted on several occasions with the assistance of the Commission to reach a conciliation on the remaining issue of limitation of contacts, but were unsuccessful.

A prehearing conference was held on April 15, 1987, before Dennis P. McGilligan, Chairperson, during which the parties agreed to the following issues for hearing:

> Did respondent retaliate against the complainant with respect to the limitation on contacts with the Oshkosh Job Service Office?
>
> If so, what is the appropriate remedy?

Hearing in the matter was held on September 11, 1987 and December 7, 1987, before Chairperson McGilligan. The parties completed their briefing schedule on March 30, 1988.

FINDINGS OF FACT

1. In late June of 1971, the complainant began working for the respondent as an Industry, Labor and Training Representative 1 (ILTR 1). He was reclassified to the ILTR 2 level in 1972.

2. Complainant's position was within the Division of Apprenticeship and Training, one of seven divisions within DILHR. The function of the Division of Apprenticeship and Training (DAT) is to develop and maintain apprenticeship and other on-the-job training opportunities and training standards in order to provide skilled workers to industry. Complainant was responsible for apprentice and related programs and maintained numerous contacts with employers, unions, various units of government (including local and federal), VTAE districts, etc., in order to carry out his duties.

3. One of the other divisions within DILHR is the Job Service Division which is primarily involved in matching applicants to employers as a public employment agency.

4. Complainant was responsible for administering apprenticeship programs within a specific geographic area (Winnebago and Outagamie counties) and promoting the division programs. Complainant worked out of an office in Appleton. Complainant's supervisor, Clarence Reinholtz, was Northeast Regional Chief for Field Operations for DAT.

5. The Oshkosh and Menasha district offices of the Job Service Division fell within the geographic limits of the appellant's apprenticeship and training responsibilities. The complainant maintained contacts with the two district offices so that he would obtain information from Job

Service personnel of positions that might qualify as apprenticeships. He also provided information to Job Service employes of possible employment opportunities for Job Service clients. Complainant would become aware of these opportunities as a consequence of his apprenticeship field work.

6. The complainant held various positions in Local #2748 including Chapter 15 chair, steward and vice-president until March of 1985.

7. Walter Marty has been the director of the Oshkosh Job Service office at all times material herein. As such there has never been any supervisory relationship between complainant and Marty. The complainant's only connection to Marty was that Oshkosh was within the territory he served as a representative of the Apprenticeship and Training Division. In addition to his job, the complainant came into contact with Marty in his role as a union representative.

8. In September of 1983, Walter Marty wrote a memo (seeking advice on how to deal with complainant) to Bill West of DILHR Field Operations after observing the complainant in the Oshkosh office on September 28, 1983, performing what Marty thought was union business rather than DILHR business. When Marty and his assistant Patrick Quirt, a Job Service supervisor, confronted complainant, Vander Zanden admitted that within the course of his 35-40 minutes of discussion with two employes concerning apprenticeship matters, the subject of one employe's "bumping" rights was discussed. The September 28th incident included a heated exchange between the complainant and Marty and Quirt and some physical contact. Complainant was briefly prevented from leaving the building by the two men and became very upset repeating words to the effect, "Please let me leave, I want to leave." Afterwards neither the complainant nor Marty or Quirt discussed the incident again. The complainant was not treated differently by Marty

or Quirt after the incident, and continued to go to the Oshkosh office without interference. The events of September, 1983, were the first problems Marty had with complainant and strained their relationship.

9. In late December 1983 or early January 1984 the complainant was contacted by several employes of the Oshkosh Job Service office in the context of his role as a union representative about the management of the Oshkosh office. Complainant then conducted an informal investigation of the situation wherein he heard a large variety of complaints from Oshkosh Job Service employes.

10. By letter dated February 4, 1984, the complainant disclosed to Howard Bellman, DILHR Secretary, information relating to alleged mismanagement within the Oshkosh Job Service office and focusing on Walter Marty's conduct. The letter of disclosure alleged, inter alia, that 1) numerous employes (particularly women) within the Oshkosh office had been harassed by Marty, causing some to transfer or resign, 2) an atmosphere of fear and intimidation in the Oshkosh office, 3) excessive job pressures on some employes, 4) one favored employe was not required to work full 40 hour weeks and had falsified records once, 5) Marty came to work late or was gone from the office for long periods of time and sometimes returned from lengthy lunch hours with alcohol on his breath.

11. As a consequence of complainant's letter, respondent conducted an investigation of management activities in the Oshkosh office. Interviews were conducted between February 14 and 28, 1984. The investigation was concluded by April of 1984 and included interviews with around 40 persons. Before the conclusion of the investigation, Marty had been provided a copy of complainant's letter to Howard Bellman. As a consequence of the

investigation Marty was reprimanded by letter dated March 30, 1984 as follows:

> This letter is a written reprimand based on the following five findings resulting from the investigation recently completed by the Job Service Division. You will also be provided with a copy of the final investigative report.
>
> 1. Prior to her retirement you made statements in reference to Mae Klipstein, an employe in the Oshkosh district office, to the effect that you would make her job so rough that she would retire or quit. It is unacceptable for a District Director to make statements about staff of a nature that can be viewed as pressuring or intimidating.
>
> 2. In 1981 when there was a misappropriation of WIN petty cash funds you did not take immediate and responsible action to investigate and report the problem. This is in violation of work rule I-B.
>
> 3. You inappropriately have told sexually oriented jokes in the district office breakroom which were offensive to some employes. Although other staff may occasionally relate similar jokes it is inappropriate for a district director to allow and contribute to the offensive environment. You have also made sexual remarks to female staff members which are deemed to be degrading and unwarranted.
>
> 4. For a number of years you have authorized an annual party where there was the presence and consumption of alcoholic beverages at the district office after work hours. This is in violation of work rule IV-G.
>
> 5. You have used excessive and prolonged loudness in talking with employes. This can be described as "shouting" and is inappropriate in the work environment.
>
> Any future incidents involving the identified problem areas may result in further disciplinary action. You may appeal this action, if you desire, in accordance with the Department grievance procedure as identified in your employe handbook.

12. Also on March 30, 1984, John E. Bauer, Assistant Administrator, Field Operations for the Job Service Division, sent complainant a letter which stated in relevant part:

> The allegations presented in your February 4, 1984 letter to Mr. Bellman against Mr. Walter Marty have been investigated. The results of the fact finding process indicate that many of the charges were unfounded and/or could not be substantiated. The investigative process did review several problem areas and appropriate corrective action has been taken....

> The fact finding process and newspaper coverage did generate substantial support from many individuals on behalf of Mr. Marty. It is important that we work together to avoid any further polarization of staff which can contribute to a stressful and tense environment for all parties. You can provide valuable assistance by encouraging staff to focus on productive work relationships between represented and unrepresented personnel....

13. Complainant was away from work at a military (navy) training camp in California during most of April in 1984. His first visit to the Oshkosh office after returning to work was on May 2, 1984. On that date complainant and Walter Marty had another altercation. Walter Marty felt complainant was discussing personal matters with members of the Oshkosh staff during work time. Complainant had gone to Barb Crawley's office to update himself on apprenticeship activities during the previous month. He also wanted to tell her about an employer he had just visited who wanted machinists. During this discussion complainant spent about five minutes telling Crawley about his California trip. While on his way to lunch Marty stopped and asked the complainant what he was doing, and informed him that from then on he had to provide notification of his visits, and that he was interfering with Crawley's work period. Marty also informed the complainant that any further contacts complainant had with "his office" would have to be cleared by Marty or Quirt. The complainant considered that "any contact" meant any contacts at all including telephone calls. Marty offered no explanation at that time for his instruction to the complainant. In Marty's view his concern was limited to the situation he discovered on May 2: an unannounced in-person visit which resulted in the complainant discussing his California vacation on work time with one of the Oshkosh district employes. Marty felt that it was a more efficient way to do business by calling ahead.

14. On May 10, 1984, the complainant wrote the following letter to Walter Marty and asked for clarification of the May 2nd oral instructions he had received regarding limitations on his contacts with the Oshkosh office:

> On May 2, 1984 I was in the Oshkosh Job Service office. At that time you requested that I not talk to DILHR employes in that building without your approval.
>
> On May 3, 1984 I needed approval to return a phone message from one of the employes. I discussed this approval to talk to the person with Patrick Quirt. Pat indicated that he did not understand your request the way I did. I then asked that your request be put in writing so that I would have something to refer to. He indicated that this would be done.
>
> To date I've not recieved the written request.
>
> Needless to say I have a difficult time servicing the staff at Oshkosh Job Service without free access to them. With a desire to service the staff, and fulfill your request, I ask that you provide a copy of your request as soon as possible.

15. On May 17, 1984, Walter Marty answered complainant's May 10, 1984 letter and clarified his instruction as follows:

> I have discussed your conversation with Pat Quirt; you apparently didn't understand my request. You were not asked to clear telephone contact with our staff. You were asked to clear personal contact with local Job Service management.
>
> Your visitation rights as a union representative are clearly defined in the appropriate contract section. I believe that we are agreed that Oshkosh management will make every effort to accommodate you in that role upon the required advance notification.
>
> In your role as a DAT representative I see limited need for an in-person visit to our office. The majority of these contacts can be handled by telephone most efficiently.
>
> To that end, we will identify John Witherall, OJT Specialist, as your single contact person. John's role in Job Service most nearly approximates your role in DAT. John will also follow up on your job order leads, which by the way, we appreciate. We ask then that you use John as your single contact resource for DAT-Job Service related business.
>
> Your visits as a DAT representative appear to be simply because you are in the area, rather than planned. Again, in my view, these visits can be reduced to a telephone contact in most cases. Should an in-person contact be necessary, I suggest that you call ahead to

> management so that arrangements can be made to accommodate your request.
>
> Unscheduled appearances are subject to protocol found in every organization; we would expect that you identify yourself at the reception desk and ask to see myself or a supervisor to discuss the purpose of your visit. Unscheduled visits run the risk of not being satisfied due to previous commitments and staff assignments and would not be productive for either agency.
>
> Visits of a personal nature with our staff during scheduled work hours are not permitted. Your unscheduled appearance on May 2, 1984, without management's knowledge or approval, to discuss your trip to California on staff time is deemed to be inappropriate, for example.
>
> I feel that this narrative will answer your question as well as clarify our position on the matter and should help you accomplish any legitimate business you may have with the Oshkosh District office operation.
>
> If you have any further questions, feel free to call me.

Following receipt of the above letter, complainant understood for the first time that the aforesaid restriction did not apply to telephone calls.

16. Walter Marty's action imposed limitations on complainant's activities that were not imposed on other DILHR employes or on his successor. Complainant did not have similar restrictions placed on him at any of the other offices that he dealt with. Marty did not place such a restriction on complainant at any time prior to the instant series of disputes with complainant. Marty's actions made complainant's duties more difficult and inconvenient for him to perform, and limited his effectiveness.

17. Walter Marty placed the restriction on complainant's contacts with the Oshkosh Job Service office in part because he felt it was a more efficient, professional way of conducting business. Marty also restricted complainant's interaction with the aforesaid office in retaliation for complainant's interference with his management of the office.

CONCLUSIONS OF LAW

1. The complainant is eligible to file a complaint of retaliation pursuant to Subch. III, Ch. 230, Stats.

2. Respondent is a governmental unit within the meaning of Subch. III, Ch. 230, Stats.

3. The complainant has the burden of proof.

4. Complainant has satisfied his burden.

5. Respondent retaliated against the complainant with respect to the limitation on contacts with the Oshkosh Job Service office.

DECISION

This complaint was filed under §230.83(1), Stats., which prohibits retaliation against state employes who have made a disclosure of improper governmental activities. This provision is part of Subch. III, Ch. 230, Stats., entitled "Employe Protection," which was enacted under the provisions of 1983 Wis. Act 409 with an effective date of May 11, 1984.

As noted in the Initial Determination issued by the Commission on December 20, 1985, the method of analysis applied in Whistleblower retaliation complaints is similar to that applied in the context of a retaliation claim filed under the Fair Employment Act (FEA). Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.W. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

As noted above, the effective date of the Whistleblower Law was May 11, 1984. The complainant made his disclosure in a letter dated February 4, 1984. In an interim decision issued on August 15, 1985 in the cases of Hollinger v. UW-Milw., 84-0061-PC-ER and Gertsch v. UW-Milw., 84-0063-PC-ER, the Commission held that the Whistleblower Law should be construed as protecting employes who made a disclosure before the effective date of the act where the employe has alleged retaliation occurring after the Act's effective date. Walter Marty first announced the policy of restricting complainant's contacts with the Oshkosh Job Service office on May 2, 1984. However, the policy was later clarified in writing by letter dated May 17, 1984 and clearly was in effect on the date that the Whistleblower Law became effective. Consequently, for the reasons discussed in the Initial Determination and noted below, the Commission concludes, contrary to respondent's argument, that the complainant may allege illegal retaliation under the Whistleblower Law:

> "As long as the policy dictated the complainant's conduct on May 11, 1984, and thereafter, the complainant may allege illegal retaliation under the Whistleblower Law. These circumstances are analogous to applying a continuing violation theory in determining whether a Fair Employment Act (Subch. II, Ch. 111, Stats.) case was timely filed. See, generally, Olson v. DHSS, 83-0010-PC-ER (4/27/83)."

Although the Commission did note in the Initial Determination that:

> "There may be some question as to whether the continuing violation analogy should be determinative. However, the instant complaint is being reviewed in the context of the probable cause standard which is less rigorous than the one used to decide whether retaliation occurred...."

The Commission concludes that consistent with its past approach and in order to effectuate the purposes of the Whistleblower Law, it will apply a continuing violation theory to determine that the instant complaint is covered by the Whistleblower Law.

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In cases of this nature, the burden of proof is on the complainant, except that to the extent that a presumption of retaliation is created by action of §230.85(6), Stats., the employer has the burden to rebut that presumption. A disciplinary action is presumed to be retaliatory if it is:

> " ... a disciplinary action under s. 230.80(2)(a) which occurs or is threatened within 2 years, or ... a disciplinary action under s. 230.80(2)(b),(c) or (d) which occurs or is threatened within one year, after an employe discloses information under s. 230.81 which merits further investigation...."

Therefore, before there can be a presumption of retaliation, there must be a disciplinary action under §230.80(2)(a),(b),(c), or (d), Stats.

Section 230.80(2), Stats., provides as follows:

> (2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
> (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
> (c) Reassignment.
> (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

As will be discussed below, respondent's action in this case does not fall under any of the specific transactions enumerated in subsections (a), (b), (c), and (d), but rather constitutes a "disciplinary action" by virtue of the general language in the introductory part of §230.80(2), Stats. Therefore, the action taken was not an action under subsection (a), (b), (c) or (d) of §230.80, and the presumption contained in §230.85(6)(a), Stats., does not apply.

The next question is whether complainant has established a prima facie case. A prima facie case of retaliation consists of a showing that: (1) the complainant disclosed information as provided in §230.81, Stats.; (2) the disclosed information is of the type defined in §230.80(5), Stats.; (3)

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the alleged retaliator was aware of the disclosure; and (4) the complainant suffered a retaliatory action as defined by §230.80(8), Stats.; i.e., the complainant suffered a "disciplinary action" as a result of the lawful disclosure of information.

In order to establish the first element complainant must show that he disclosed information pursuant to §230.81, Stats. This statutory section provides, in relevant part, for a state employe to disclose the information to his/her supervisor in writing, or to request guidance from the Personnel Commission as to whom the information should be disclosed. The complainant made a written disclosure to Howard Bellman, Secretary of the Department, in which he alleged mismanagement by Walter Marty of the Job Service Division. Complainant could not effectively disclose to his own immediate supervisor in the Division of Apprenticeship and Training because that person was not in a position of authority as to the Oshkosh Job Service operation. Secretary Bellman, as the "supervisor" for all DILHR programs, was also supervisor of the complainant. As noted in the Initial Determination, a narrow reading of §230.81(1)(a), Stats., to only permit a disclosure to the employe's immediate supervisor would be inconsistent with the statute's policy to protect employes as well as the liberal construction provision found on §230.02, Stats.

The second element of the prima facie case requires a determination as to whether the disclosed "information" is of the type defined in §230.80(5), Stats. Section 230.80(7), Stats., defines mismanagement as "a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment" of the agency function. The allegations of mismanagement contained in complainant's February 4, 1984, letter to Secretary Bellman

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would seem to fit within this definition. "Mismanagement", in turn, is one of four types of "information" listed in §230.80(5), Stats.

The third element of complainant's prima facie case is to establish that the alleged retaliator was aware of complainant's disclosure. §230.80(8)(a), Stats. The record is undisputed that Walter Marty had received a copy of complainant's disclosure letter to Secretary Bellman by the time he imposed the requirement that complainant limit his DAT - Job Service contacts in Oshkosh to one person.[1]

The fourth element of complainant's prima facie case is to demonstrate that he suffered a retaliatory action because of the disclosure. The statute defines a retaliatory action as a disciplinary action taken because the employe lawfully disclosed information under §230.81. The definition of "disciplinary action" is quite broad and is found in §230.80(2), Stats., as follows:

> "Disciplinary action" means <u>any action taken with respect to an employe which has the effect, in whole or in part, of a penalty</u>.... (emphasis added)

The word "penalty" is defined in <u>Webster's New World Dictionary</u>, Second College Edition, (1974), at page 1050 as "any unfortunate consequence or result of an act or condition."

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[1] Respondent argues that because Walter Marty did not function as a supervisor, appointing authority, or an agent of an appointing authority <u>in relation to the complainant</u>, Marty is not covered by the provision on retaliation contained in sec. 230.83(1), Stats. (emphasis supplied) However, the Commission in an Interim Decision and Order dated September 12, 1984 already rejected this argument on two theories: one, Marty was acting in his official capacity and in legal effect was an agent of the appointing authority when he allegedly took the action set forth in the complaint; and two, the plain language of the whistleblower statute prohibits retaliatory action by an "agent of an appointing authority" with no requirement that the agent be in the supervisory chain over the complaint as argued by respondent.

The complainant's allegation that Walter Marty's restriction on his contacts with the Oshkosh staff was retaliatory fits the above definition, but just barely. Not all DILHR employes utilized personal contacts with Job Service employes to carry out their responsibilities. However, although such personal contacts were not necessary in order to perform the job, the record indicates appellant regularly had such contacts and used such contacts to successfully perform his job. Contrary to the respondent's arguments, the elimination of the personal contacts still had the effect of at least a minimal penalty on the complainant[2] because it restricted his dealings with the Oshkosh office and required him to direct his personal contacts through Mr. Witherall, who did not care about apprenticeship issues and was not very responsive to requests for information or action.[3] No other DILHR employe other than complainant (including his successor) was subject to the same restrictions. All of the retaliatory action occurred close enough to the date of the disclosure and subsequent investigation and discipline of Marty to generate an inference of retaliation.

Based on the foregoing analysis, the complaint has established a prima facie case as to his aforesaid allegation. The respondent must next show a non-discriminatory reason for the action taken.

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[2] The Commission in Hruska, Luecke and Weaver v. DATCP et al, Case Nos. 85-0069, 0070 and 0071-PC-ER (8/13/85) similarly found that a negative change in working conditions (in that case assignment to work which was unpleasant and in an unfavored location) was a form of penalty and hence a "disciplinary action" under the general language of §230.80(2), Stats.

[3] Unrebutted testimony of complainant.

Marty contends that the restriction placed on complainant's contacts with Oshkosh staff was to limit his conduct of personal business on state time and to make the complainant's interactions with Job Service more efficient. Marty also testified that the restriction was a consequence of a long-standing problem with the complainant intermixing his union activities with his apprenticeship and training duties.

There is sufficient evidence in the record to establish that the reason advanced by Marty as the basis for the restriction was pretextual. There clearly was an antagonistic relationship between complainant and Marty that preceded the complainant's disclosure to Secretary Bellman which intensified during and after that investigation. The May 3rd incident that ostensibly precipitated the letter was based on casual questions about complainant's California trip by an Oshkosh employe. The primary purpose of the conversation had to do with Job Service and apprenticeship issues. Indeed, there is no persuasive evidence in the record that complainant's visits to the Oshkosh Job Service office were for purposes other than business. Occasionally, a personal or union matter came up but only casually and for a short duration. The evidence supports a finding that Marty's restriction was part of an antagonistic and deliberate attempt to freeze complainant out of all contacts with the Oshkosh office, thereby minimizing or eliminating the possibility that complainant would again interject himself into management's domain. Oshkosh staff were restricted in their contacts with complainant. The timing of the restriction raises a strong inference of retaliation, coming as it did very soon after the completion of an investigation (triggered by complainant's letter to Secretary Bellman) that resulted in five findings that served as the basis for a written reprimand issued to Marty. The restriction also must be

considered in light of Marty's February 15th complaint and request for imposition of discipline against the complainant[4] which was issued one day after complainant first appeared as a representative for employes who were being questioned as part of the investigation. Finally, the restriction must be considered in light of Marty's hostile attitude toward the act of whistleblowing[5] and his desire to get the complainant.[6] All of the above facts are sufficient, in the Commission's opinion, to show pretext.

Based on all of the above, the Commission finds that the answer to the issue as stipulated to by the parties is YES, the respondent retaliated against the complainant with respect to the limitation on contacts with the Oshkosh Job Service office. An issue remains with respect to the proper remedy.

The complainant seeks the following remedies:

(1) A posting of the whistleblower law and the remedies available under it in all the DILHR offices in the State.

(2) A finding that Mr. Marty's actions were discriminatory and that they violated the policy of the State of Wisconsin.

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[4] Appellant Exhibit 20.

[5] See, for example, Complainant Exhibit 15 wherein Marty referred to the Employe Protection Law as the "Squealer" law and Complainant Exhibit 18 wherein Marty talked about rewarding "atrocious behavior of employes by giving them candy. Like children, the behavior may or may not change, but perhaps the crying will stop."

[6] For example, on May 3, 1984, the day after Marty restricted complainant's contact with the Oshkosh office, Marty met with Ed Kehl wherein the subject of bringing suit against complainant arose. Kehl responded that if such an action was taken it would be at Marty's personal expense and without DILHR approval. See also Complainant Exhibits 19 and 20.

(3) An apology to the Complainant from the Department and Mr. Marty for the action that was taken against him.

(4) Attorney's fees and expenses related to pursuing this action.

(5) All costs incurred by the Complainant in pursuit of this action and any other actual damages incurred.

Section 230.85(3), Stats., provides for a wide variety of remedies as follows:

> (3) (a) After hearing, the commission shall make written findings and orders. If the commission finds the respondent engaged in or threatened a retaliatory action, it shall order the employe's appointing authority to insert a copy of the findings and orders into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. In addition, the commission may take any other appropriate action, including but not limited to the following:
> 1. Order reinstatement or restoration of the employe to his or her previous position with or without back pay.
> 2. Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.
> 3. Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.
> 4. Order payment of the employe's reasonable attorney fees by a governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to participate in proceedings before the commission.
> 5. Recommend to the appointing authority of a respondent who is a natural person that disciplinary or other action be taken regarding the respondent, including but not limited to any of the following:
> a. Placement of information describing the respondent's violation of s. 230.83 in the respondent's personnel file.
> b. Issuance of a letter reprimanding the respondent.
> c. Suspension.
> d. Termination.

The first four items requested by complainant easily fall within the authority granted the Commission under the Whistleblower Law to grant remedies and are provided complainant as relief in order to effectuate the purposes of the Law. With respect to attorney's fees, any such request by complainant should be made by motion and include an itemized application along with with appropriate documentation and should be submitted to the

Commission and to the opposing party no later than 30 days from the date of this order. The losing party then has 20 working days from the date of receipt to respond in writing to the motion.

The last remedy request by complainant for "all costs incurred by the complainant in pursuit of this action and any other actual damages incurred" is quite broad and difficult to respond to in its present form. If complainant wishes to pursue this remedy, he should file a motion and include an itemized application along with appropriate documentation with the Commission and to the opposing party no later than 30 days from the date of this order. The losing party then has 20 working days to respond as noted above.

ORDER

Respondent is ordered to take such action as is necessary in order to effectuate this decision. The matters of attorney's fees and other costs/damages will be taken up as aforesaid, and the Commission will retain jurisdiction over this case to the extent necessary to resolve those matters.

Dated: ____________________, 1988 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

DPM:rcr
JGF002/2

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