STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID J. STRUPP,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Whitewater)

Respondent.

Case No. 85-0110-PC-ER

FINAL DECISION AND ORDER

This matter is before the Commission following the promulgation by the hearing examiner of a proposed decision and order, a copy of which is attached hereto, and consideration of the parties' arguments with respect thereto. The Commission adopts the proposed decision and order as its final decision of this matter. The Commission adds this additional opinion:

The complainant objects inter alia, to the following conclusion set forth in the proposed decision:

> "3. In order to establish that the discharge was in violation of §101.055(8)(a), Stats., it would have to be established that the aforesaid protected activity was a substantial reason for the discharge, or that the discharge would not have taken place 'but for' engagement in the protected activity."

The complainant cites a number of Wisconsin Supreme Court decisions wherein the Court refused to follow federal court precedents in interpreting various Wisconsin laws. However, none of these laws contained a specific statement akin to that found in §101.055(1), Stats., that it was the intent of the law to give state employes "rights and protections

relating to occupational health and safety equivalent to employes in the private sector under the occupational health an safety act of 1970 [OSHA]."

The complainant also cites the following from the decision in Donovan v. Peter Zimmer America, Inc., 557 F. Supp. 642 (D.S.Car. 1982), which involved an action brought under OSHA, in arguing that the proposed decision misapplied federal law relating to OSHA:

> "It is settled in this circuit, and most of the others, that it is enough (to find a discriminatory or retaliatory discharge) that a discriminatory motive was a factor in the employer's decision to discharge." 557 F. Supp. at 651.

However, the cases cited by the Court in support of this proposition were all proceedings under the National Labor Relations Act, as opposed to OSHA. Furthermore, it seems clear that the court was requiring that the discriminatory motive be a substantial factor rather than any factor, as it went on to conclude as follows:

> "... it is established that [the employes] were discharged on June 30,1977, in substantial part, if not wholly, because of activity protected by the Act. In any event, 'a business reason cannot be used as a pretext for a discriminatory firing.' (Marshall v. Chapel Electric Co., [1980 OSHB p. 29,360, 29,361 (S.D. Ohio, 1980)]; J.P. Stevens & Co., Inc. v. NLRB, supra.) Moreover, defendant has not demonstrated that the three employes would have been fired in the absence of the protected activity. See Marshall v. Commonwealth Aquarium, supra, 469 F. Supp. at 693." 557 Supp. at 652.

The Chapel Electric Co. case, cited by the Court and decided under OSHA, is completely consistent with the approach to causation set forth in the proposed decision and order. That decision held:

> ". . .if the employee engages in activity protected by the Act, and that protected activity was a substantial reason for discharge, a business reason cannot be used as a pretext for a discriminatory firing. In addition, if the discharge would not have occurred 'but for' the employee's protected activity, then 29 U.S.C. 660 (c) has been violated." (emphasis added)

Even the NLRA cases cited by the Court in Donovan v. Peter Zimmer America, Inc., are not inconsistent with the result reached in the instant

case. For example, in Neptune Water Meter Co. v. NLRB, 551 F. 2d 568, 570 (4th Cir. 1977), the court held as follows:

> "In the end, after weighing all relevant factors including particularly the gravity of the offense, an unfair labor practice may be found only if there is a basis in the record for a finding that the employee would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity."

In NLRB v. Kiawah Island Co. Ltd., 650 F. 2d 485, 491 (4th Cir. 1981), the causation issue was discussed in this manner:

> "If both good and bad motives are involved, the evidence must demonstrate why the good motive was not the sole reason for the discharge. Where the employer has a legitimate business motive but would not have discharged the employee for that reason except for his union membership or anti-union animus on the part of the employer, the discharge is unlawful."

The holding in J. P. Stevens & Co. Inc. v. NLRB, 638 F. 2d 676, 681 (4th Cir. 1980), is to the same effect.

Therefore, Donovan v. Peter Zimmer America, Inc., supra, is not precedent for the theory that any discriminatory motive for discharge, regardless of its significance or relative weight, is an adequate basis of causation for OSHA liability, or that the result reached in the proposed decision is incorrect.

## ORDER

The attached proposed decision and order, which is incorporated by reference as if fully set forth, is adopted by the Commission as its final disposition of this matter, with the addition of the foregoing opinion, and the complaint is dismissed.

Dated: July 24, 1986

STATE PERSONNEL COMMISSION

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DONALD R. MURPHY, Commissioner

AJT:jmf
JMF02/1

LAURIE R. McCALLUM, Commissioner

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STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID STRUPP,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Whitewater),

Respondent.

Case No. 85-0110-PC-ER

PROPOSED DECISION AND ORDER

## Nature of the Case

This is a complaint pertaining to occupational health and safety pursuant to §§101.055(8) and 230.45(1)(g), Stats. The complainant has alleged that the respondent terminated his probationary employment because he took certain actions protected by §101.055, Stats., Public Employe Safety and Health. In an initial determination dated August 15, 1985, a commission investigation found that there was probable cause to believe respondent retaliated against complainant by terminating his employment.

## Findings of Fact

1. Complainant began his employment at the University of Wisconsin-Whitewater (Whitewater) on March 4, 1985, in a position in the classified civil service classified as Stock Clerk 1, with a six month probationary period. This position was in the department of procurement services (stores).

2. Complainant's immediate supervisor was Robert J. Kuykendall. Mr. Kuykendall reported to Mr. Burghaus.

3. During approximately the first two months of complainant's employment, complainant was primarily engaged in making deliveries around campus, and he had little contact with Mr. Kuykendall. Complainant's job performance during this period was good, as was reflected on his May 1, 1985, written performance evaluation (Complainant's Exhibit 2).

4. On April 10, 1985, the complainant assisted with the delivery of a drum of a caustic chemical called Rustoscale, weighing approximately 583 pounds, to the library basement area. Five employes, including complainant, assisted in moving the drum down the basement stairs.

5. On April 10, 1985, complainant assisted with the delivery of another corrosive chemical, sulfuric acid, weighing approximately 230 pounds, to the library basement area. Complainant and another employe moved the drum down the basement stairs using handles on each side of the drum.

6. Beginning around May 1, 1985, Mr. Kuykendall assigned the complainant to work inside the stores receiving area so as to learn duties involving receiving, shipping, and loading and unloading supplies. Complainant had more contact with Mr. Kuykendall in this setting.

7. On May 16, 1985, complainant was eating lunch when a student delivered an item to stores. Complainant made no effort to help him. After completing the delivery the student made a sarcastic remark to the complainant along the lines of "Thanks for the help." The complainant responded angerly in a loud voice, and the student lodged a complaint with Mr. Burghaus. Shortly thereafter, Mr. Kuykendall counseled complainant regarding his reaction to the student.

8. On May 16, 1985, complainant operated a forklift while not wearing a hard hat, and became angry with a more senior co-worker, Joe Wagner, who

informed him of respondent's requirement that one be worn under these circumstances. Prior to this time, no supervisor had informed the complainant of the rule or directed him to wear a hard hat.

9. On May 23, 1985, Mr. Kuykendall observed the complainant operating a forklift without a hard hat. When Mr. Kuykendall confronted complainant on this, the complainant asked him what state law required that he wear a hard hat. He also said he would not wear a hard hat because wearing things on his head caused him headaches. Mr. Kuykendall told him he would have to confirm this with a medical statement.

10. By a memo to Mr. Kuykendall dated May 28, 1985, Complainant's Exhibit 12, the complainant responded as follows:

> "After speaking with Mark Rehrauer on May 24 about your request for a medical statement and having been informed that I would be responsible for any expenses to secure same, I have decided to comply with your hard hat requirement during forklift operations.
>
> My decision to comply was based in part on the premise that the actual length of time a hard hat might be required would be relatively short and that the presence of protective headgear for short period would not cause me any problems such as the headaches I mentioned. Should this prove otherwise I will inform you at the time the problem occurs."

11. The complainant did not operate a forklift at all during the period May 23-28, 1985. Thereafter, he did wear a hard hat while operating a forklift.

12. On June 11, 1985, complainant left his keys, included a master key, unattended on a desk for several hours.

13. On June 18, 1985, complainant advised Mr. Kuykendall, when Mr. Burghaus was present, that he would not deliver a drum of sulfuric acid to the library basement area because of concerns of safety.

14. Subsequent to the deliveries described above in findings #4 and #5, complainant had reached the conclusion that it would be unsafe to deliver sulfuric acid containers to the library basement as had been done before.

15. Both the stairs to the basement and the basement floor are concrete. The stairs to the basement are relatively long, steep and wide. If two employes were carrying an item like the sulfuric acid drum by the handles on each side, both could not reach the handrails due to the width of the stairs. Protective gloves, apron, and face shield are readily available to any employes involved in this task. The face shield carries a disclaimer that it does not provide unlimited protection against chemical splash and recommends additional eye protection if chemical splash is a hazard. Complainant was concerned that the rubber apron was so long that it created a risk of stumbling on the stairs. There was an emergency shower with a pull chain near the bottom of the stairs. There also was an appliance dolly available for use in carrying the drum down the stairs. The sulfuric acid drum was marked "Danger! Causes Severe Burns - Corrosive." The type of drum involved is rated by the U. S. Department of Transportation to sustain falls of 23 feet without undergoing damage, although complainant was not aware of this at the time he refused to make the delivery.

16. Mr. Kuykendall told the complainant not to make the delivery, that he would get someone else to do it.

17. On June 19, 1985, Mr. Kuykendall discussed this incident with complainant. He asked him what other tasks he would not do. Complainant responded that he could not say in advance as this would be speculative. Mr. Kuykendall asked him if he had any suggestions as to how the delivery

Copies of this memo were directed to Mr. Burghaus, Dean Wolf (Burghaus's supervisor), and complainant's personnel file.

20. On June 21, 1985, the complainant encountered Mr. Kuykendall in the men's room whereupon he told him that the aforesaid memo would make good toilet paper.

21. On June 24, 1985, complainant responded to the aforesaid memo from Mr. Kuykendall with a memo to Mr. Burghaus Complainant's Exhibit 8. This contained the following:

> After considering the contents of Robert Kuykendall's memorandum dated June 20 it is my opinion that it is misleading, biased and, as a result, a poor reflection of his supervisory abilities.
>
> At no time prior to the incident that prompted his memorandum was my work questioned. Neither was my alleged unwillingness to perform required tasks and my need to exhibit an attitude of helpfulness toward my fellow employees mentioned. On the contrary, based on my performance review on May 1, I had every reason to believe that I was making satisfactory progress in my position as a Stock Clerk 1.
>
> I believe it should be pointed out here and that it is interesting to note that Kuykendall's memo makes no mention of the details surrounding my refusal to perform the task in question. It should also be noted that this is the first and only instance that I refused to perform a requested task. It ignores completely my concern for mine and my fellow workers safety after being asked to move containers exceeding 200 pounds each, filled with sulfuric acid, down a flight of twenty-one stairs. It fails to point out that my refusal to perform the task is the direct result of having performed it on April 29 with another fellow employee; Joel Olson, a maintenance mechanic. It was only after actually performing the task that I determined that the method used in transporting these acid containers was unsafe. Not only did I feel that the requirement of each man lifting in excess of 100 pounds each was unsafe, the fact that a highly caustic chemical substance was involved created, in my mind, a double jeopardy situation. In addition, it is my opinion that the safety wear available for moving the material involved is inadequate. The fact the Kuykendall's memorandum omits this information suggests to me a conscious effort on his part was made to "cover up" the facts or to relate them in such a way that would be favorable to his own end.

> At this point, that end seems to be not granting me permanent status only because I questioned his directive.
>
> As for my job description, in a discussion following my refusal to move the containers Kuykendall stated that a willingness to "go beyond" the job description that was furnished to me might be a necessity to gain permanent status. At that time I informed him that I disagreed with that point of view. On June 18, the day that I was asked to assist in the transport and delivery of the acid containers, Earl Gutzmer, Joel Olson and Jay Townsend were all present and all are classified Maintenance Mechanics. This in itself suggests that the job at hand was indeed outside the realm of a Stock Clerk 1's intended function.
>
> As for "common goals" and helping my fellow employees, I believe I can arrange for the testimony of at least a dozen fellow workers who can attest to my acceptable and, oft times, helpful job performance.
>
> Finally, it is my firm belief that I have been doing far more than the "bare minimum" Kuykendall's memo suggests that I have been doing and have records of my route activity to support me in that claim.
>
> I can assure you that if, after my six-month probationary period is up, I am not granted permanent status it will not be because of my job performance but more likely because of a tendency on my part to question directives that I feel need to be questioned.
>
> Copies were directed to Dean Wolf, Mr. Kuykendall, "DILHR-Legal Services Bureau," and to his personnel file.

23. After receiving this memo, Dean Wolf directed Mr. Burghaus to meet with the complainant and Mr. Kuykendall, and the three met on June 26, 1985. Mr. Burghaus expressed concern that complainant had contacted DILHR with his safety concerns via the aforesaid memo (Complainant's Exhibit 8) without first having exhausted all avenues on the campus. Both supervisors told complainant that, in effect, he had a bad attitude. They also told him that his duties were not limited strictly to what was on the face of his position description. Complainant continued to insist that he was not required to do what was not specifically in his position description.

24. On June 24, 1985, complainant sent the following memo, (complainant's Exhibit 9) to the Department of Industry, Labor and Human Relations Legal Services Bureau:

> The union I have been making regular contributions to since I began working for the University of Wisconsin-Whitewater cannot represent me until I have completed my probationary period. I have been informed by the university's personnel director, among others, that until my six month probation is satisfied I have no rights under the WSEU Council 24 agreement with the State. I have reason to believe that my immediate supervisor's relationship with his immediate supervisor extends outside of the workplace and that their friendship existed even before he started working for the university.
>
> So who do I voice my concern to when I am asked to perform a task that I feel is not only unsafe but outside of the job description that I was furnished with when I began, when my expression of concern apparently jeopardizes my achieving permanent status as a classified employee with the State?
>
> It is my hope that your agency might be able to assist or direct me in this matter. I have enclosed a copy of the memorandum I recently received from my supervisor that prompted this inquiry and a copy of my response to it. Your assistance or direction would be greatly appreciated.

There is no indication that anyone in management was aware of this document prior to complainant's termination, which occurred effective July 1, 1985.

25. On June 27 and 28, 1985, the stores department suspended normal operations due to inventory. Complainant wore shorts to work because of the heat. Mr. Kuykendall told complainant that his wearing shorts was unsatisfactory and inappropriate. The next day, complainant again wore shorts to work, and, when he was confronted by Mr. Kuykendall, told him he was not subject to the employe dress code because he was a probationary employe.

26. After this incident with the shorts, Mr. Kuykendall decided to pursue termination of complainant's employment. He consulted with

Mr. Burghaus who concurred in his recommendation, and complainant was terminated effective July 1, 1985. The letter informing complainant of his termination, Complainant's Exhibit 10, contained the following:

> You have completed approximately four months of your probationary period as of this date. Evaluations were done for the period of 3/4/85 to 4/19/85 with a review session on 5/16/85. the second phase evaluation was set up and reviewed on 5/16/85 and during that session, items were discussed in relation to your performance with your supervisor, Robert J. Kuykendall. On May 23, 1985, you and your supervisor had a discussion relating to classified work rules, in particular Work Performance, as follows:
>
> (F) Failure to comply with health, safety and sanitation requirements, rules and regulations.
>
> The memo in your Personnel File is in reference to wearing a hard hat. On June 20, 1985, there was another meeting with you. A copy of the summary of that meeting is in your Personnel File, and makes reference to work attitude and an unwillingness to perform your required duties. There was stated in that memorandum the need for improvement.
>
> On July 1, 1985, during your evaluation when you met with your supervisor, Robert Kuykendall, you were told that you have not performed satisfactorily, having a poor attitude, and that he had recommended your employment be terminated. Based on the recommendation of Robert Kuykendall, the following action is being taken:
>
> > You are hereby notified that pursuant to the authority vested in me by the University of Wisconsin-Whitewater, your employment is being terminated at the completion of your shift at 3:30 p.m. today, July 1, 1985.

27. The complainant's termination was based in part on his refusal to participate in the delivery of the sulfuric acid drum on June 18, 1985, and on the fact that he sent a copy of his June 24, 1985, memo, Complainant's Exhibit 8, to DILHR, but these factors were not a substantial reason for the action, and the termination would have occurred in the absence of these factors.

## Conclusions of Law

1. This matter is properly before the commission pursuant to §§101.055(8) and 230.45(1)(g), Stats.

2. The complainant has the burden of proof to establish, and he has established that he engaged in activities protected under §101.055(8), Stats., when he refused to participate in the delivery of the sulfuric acid drum on June 18, 1985, and when he sent DILHR a copy of his June 24, 1985, memo, Complainant's Exhibit 8.

3. In order to establish that the discharge was in violation of §101.055(8)(a), Stats., it would have to be established that the aforesaid protected activity was a substantial reason for the discharge, or that the discharge would not have taken place "but for" engagement in the protected activity.

4. Regardless of whether the complainant or the respondent is considered to have the burden of proof with respect to the issue of whether complainant's participation in protected activities under §101.055(8)(a), Stats., was a substantial reason for the discharge, or that the discharge would not have taken place "but for" engagement in the protected activities, the record supports a finding, as set forth in finding #26, that the protected activity was not a substantial reason for the discharge, and that the protected activity was not a "but for" reason for the discharge or termination of employment.

## Opinion

The first legal issue raised by this case is whether the complainant's refusal to participate in the delivery of a drum of sulfuric acid on June 18, 1985, constituted a protected activity under §101.055(8)(a), Stats., which provides:

> (8) PROTECTION OF PUBLIC EMPLOYES EXERCISING THEIR RIGHTS. (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. (emphasis supplied).

The respondent argued in its brief at p.11 as follows with respect to the meaning of the underscored language:

> ". . . the relevant inquiry is not whether the employee perceived some activity as dangerous, however, the statutory language prohibits discrimination where an employee '. . . reasonably refused to perform a task which represents a danger of serious injury or death . . . .' Thus the pertinent questions are whether there is, in fact, a danger of serious injury or death in connection with the task in issue, and whether the employee's refusal to perform the task is reasonable under the circumstances." (emphasis added)

Any interpretation of §101.055, Stats., must consider the "intent" language inserted by the legislature at § 101.055(1), Stats.:

> "(1) INTENT. It is the intent of this section to give employes of the state . . . rights and protections relating to occupational safety and health equivalent to those granted to employes under the occupational safety and health act of 1970 (5 USC 5108, 5314, 5315 and 7902; 15 USC 633 and 636; 18 USC 1114; 29 USC 553 and 651 to 678; 42 USC 3142-1 and 49 USC 1421)." (emphasis added)

In Marshall v. N.L. Industries, Inc., 618 F. 2d 1220, 1224 (7th Cir. 1980), the Seventh Circuit Court of Appeals interpreted the Secretary of Labor's regulation adopted pursuant to Section 11(c)(1) of OSHA (Occupational Health and Safety Act) (29 USC 660(c)(1)). The regulation, 29 CFR §1977-12(b)(2), which was effective in 1973, provides:

> "However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would

> be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

Section 101.055(8)(a), Stats., provides, inter alia: ". . . reasonably refused to perform a task which represents a danger of serious injury or death. . . ."

In Marshall v. N. L. Industries the court held that all that was necessary to satisfy the requirements of OSHA was that the employe ". . . had a reasonable and good faith belief that the conditions leading to his refusal . . . were dangerous. . . ." 618 F2d at 1224. There are a number of factors which suggest that the same or a similar test should be applied under §101.055(1)(a), Stats.

Since the legislature stated at §101.055(1), Stats., that state workers are to have protection and rights equivalent to those granted to employes under OSHA, and at the time the state law was enacted, Laws of 1981, Chs. 360, 391, effective in 1982, the legislature presumably was aware of the federal regulations and the federal court cases interpreting it, it is logical to follow the federal approach in construing the state law.

Second, the legislature did not refer in §101.055(8)(a), Stats., to a task which "constitutes a danger of serious injury or death" -- rather it referred to a task which ". . . represents a danger of serious injury or death." (emphasis supplied). The word "represent" means "to present or picture to the mind," Webster's New World Dictionary (Second College

Edition, 1972), p. 1206. The use of this term, combined with the "reasonably refused" terminology, is consistent with the test set forth in Marshall v. N. L. Industries: ". . . reasonable and good faith belief that the conditions . . . were dangerous. . . ."

Utilizing this test, the commission reaches the conclusion that complainant reasonably refused to assist in the delivery of the sulfuric acid because of a reasonable and good faith belief that the task involved a danger of serious injury or death. This conclusion is based on the weight of the drum, the corrosive nature of its contents, the length, width, and pitch of the stairs, the concrete surfaces involved, the possibility of tripping over the apron, and the disclaimer on the face shield. Also, complainant called as a witness a well-qualified industrial safety expert who testified that it would not be safe to move the drum down the stairs by hand. This opinion was consistent with the testimony of the respondent's safety expert.

The experts also testified that it would have been safe to have moved the drum down the stairs if it had been securely fastened to a dolly. However, it must be remembered that the complainant was an inexperienced employe, and in his only previous involvement with delivering sulfuric acid, he and another employe had carried the drum down the stairs by hand. Furthermore, he was not aware on June 18th of the DOT specifications regarding the integrity of the drum when dropped. Therefore, although the delivery could have been effected safely with the use of a dolly, that factor does not lead to the conclusion that complainant's refusal was unreasonable.

Finally, the Commission notes that 29 CFR §1977-12(b)(2), provides, inter alia, that the employe ". . . where possible, must also have sought

from his employer, and been unable to obtain, a correction of the dangerous condition." It is significant that the complainant went directly to his supervisor when he was faced with this task on June 18th. While he presented the matter to his supervisor as a refusal to perform the job, for safety reasons, it is at least possible that if Mr. Kuykendall at that point had provided some approach to accomplishment of the task that would have addressed the complainant's safety concerns, it might yet have been accomplished.

The second legal issue raised by this case is whether the complainant's act of copying DILHR on his June 24, 1985, memo to Mr. Burghaus (Complainant's Exhibit 8) constitutes protected activity under §101.055(8)(a), Stats.[1]

The respondent in its brief contends, inter alia, as follows:

> "Mr. Strupp argues that his memorandum constitutes protected activity under the statute because he sent a copy of it to DILHR. Section 101.055(8)(a), Stats., however, requires that an employee file a 'request' with DILHR. The memo to Mr. Burghaus is not a 'request' as required by the statute. It is, on its face, nothing more than a rebuttal to Mr. Kuykendall's memorandum concerning the complainant's poor work performance and attitude. It is not addressed to DILHR and it contains not one word asking the department to do anything about a safety or health matter. . . ." p. 10.

The relevant language in §101.055(8)(a), Stats., is relatively broad:

> ". . . 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 . . . or exercised any other right related to occupational health or safety which is afforded by this section." (emphasis added)

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[1] Complainant also cited his June 24, 1985, letter directly to DILHR (Complainant's Exhibit 9) as protected activity, but since there is no evidence that anyone in management was aware of it prior to complainant's termination on July 1, 1985, it is unnecessary to pursue this.

In this regard, it is noteworthy that the Secretary of Labor's regulations under OSHA contains the following at 29 C.F.R. §1977.10(b):

> "An employe need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the act."

29 C.F.R. §1977.12 "Exercise of any right afforded by the act," provides, inter alia, as follows:

> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

In Donovan v. R. D. Anderson Construction Co., Inc., 552 F. Supp. 249, 253 (D. Kansas, 1982), the court decided that an employe's conversation with a newspaper reporter concerning asbestos dust on the worksite was protected under OSHA, noting that "It is clear that proceedings could be instituted after an employe's communication with the media." 552 F. Supp. at 253.

In the instant case, complainant's communication with DILHR via a copy of Complainant's Exhibit 8 certainly would constitute the exercise of ". . . any other right related to occupational safety and health," §101.055(8)(a), Stats., and, as in Donovan v. R. D. Anderson Construction Co., it could be said that a proceeding could have been initiated as a result of his communication.

Having determined that complainant engaged in protected activity, the next major legal question is the extent of causation that must be present before liability attaches under §101.055(8)(a), Stats.:

> "No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request. . . ." (emphasis supplied)

The complainant argues that any causal connection between the protected activity and the discharge is sufficient under the statute, citing Smith v. UW, Wis. Pers. Comm. to 79-PC-ER-95 (6/25/82), where the Commission held that in an employment discrimination case under the Fair Employment Act (FEA) (Subchapter II, Chapter 111, Stats.), the law is violated if illegal reasons played any part in the employment decision.

This decision is consistent with a number of other decisions in various forums to the effect that an employment decision even partially motivated by an improper consideration is violative of the FEA, the Municipal Employment Relations Act (MERA) (Subchapter IV, Chapter 111, Stats.), and the State Employment Labor Relations Act (SERLA) (Subchapter V, Chapter 111, Stats.). These decisions include, in addition to Smith v. UW, supra, the following: Lohse v. Western Express, Labor and Industry Review Commission (LIRC), ERD Case #8432123 (2/4/86), decided under the FEA; Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 151 N.W.2d 617 (1967), decided under MERA; Employment Relations Dept. v. W.E.R.C., 122 Wis. 2d 132, 361 N.W.2d 660 (1985), decided under SELRA.

However, in interpreting §101.055, Stats., it is necessary in the first instance to consider the primary tool of construction provided by the legislature at §101.055(1), Stats.:

> "(1) INTENT. It is the intent of this section to give employes of the state . . . rights and protections relating to occupational safety and health equivalent to employes in the private sector under the occupational safety and health act [OSHA]. . . ." (emphasis supplied).

At the time of enactment of the Wisconsin law, private sector employes covered by OSHA were subject to a different test of causation than that enunciated by Wisconsin forums pursuant to the FEA, MERA, and SELRA. The Secretary of Labor in 1973 had promulgated[2] 29 CFR §1977.6, which provides as follows:

> (a) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of section 11(c) apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the act does not automatically render him immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations. See, N.L.R.B. v. Dixie Motor Coach Corp., 128 F.2d 201 (5th Cir. 1942).
>
> (b) At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated. See Mitchell v. Goodyear Tire and Rubber Co., 278 F.2d 56 2 (8th Cir., 1960), Goldberg v. Bama Manufacturing, 302 F.2d 152 (5th Cir., 1962). Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

This regulation makes it clear that under OSHA, a discharge may be based in part on protected activity, so long as the protected activity was not a "substantial reason" for the discharge, or if it can be said that the discharge would have taken place "in the absence of" the protected activity. To construe §101.055(8)(a), Stats., in a manner at odds with this approach to causation would fly in the face of the legislature's admonition that state employes are to have rights and protections

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[2] 38 FR 2681.

equivalent to those afforded private sector employes under OSHA. Furthermore, the legislature's remedial provision in §101.055(8)(c), is consistent with a construction that follows OSHA.

Section 101.055(8)(c), Stats., provides, inter alia:

> "If the personnel commission or the division of equal rights determines that a violation of par.(a) has occurred, it shall order appropriate relief for the employe, including restoration of the employe to his or her former position with back pay, and shall order any action necessary to ensure that no further discrimination occurs." (emphasis supplied).

This subsection requires, regardless of whatever other relief is or is not ordered, that the employe who establishes that there was a violation of §101.055(8)(a), Stats., be restored to employment and be awarded back pay. This may be distinguished from the remedial provisions under the FEA, SELRA, and MERA, which provide considerably more latitude. Section 111.07(4), Stats., (MERA and SELRA) provides, inter alia:

> "Final orders may . . . require him to take such affirmative action, including reinstatement of employes with or without pay, as the commission [WERC] deems proper. . . ."

Section 111.39(4)(c), Stats., (FEA) provides, inter alia:

> "If, after hearing, the examiner finds that the respondent has engaged in discrimination . . . the examiner shall . . . order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay. . . ."

Section 101.055(8)(c)'s mandatory requirement for restoration and back pay seems somewhat at odds with an argument that the legislature intended that any reliance by an employer on protected activity would be considered illegal, regardless of how insignificant a role it played in the final decision, particularly when contrasted with the flexibility found in the remedial provisions of MERA, SELRA, and the FEA, which have been interpreted as prohibiting any discriminatory motivation on the employer's

part. In Employment Relations Dept. v. WERC, supra, the Supreme Court specifically commented as follows:

> ". . . in dual-motive cases, evidence that legitimate reasons contributed to the employer's decision to discharge the employee can be considered by the WERC in fashioning an appropriate remedy. For example, to remedy the violation ion of SELRA in this case, the examiner ordered the State to reinstate Hartberg but, because there was evidence that Hartberg failed to comply with work procedures, declined to credit the time Hartberg was laid off toward the remaining training period." 122 Wis. 2d at 143.

With respect to the factual question of causation, this may be looked at in the context of the framework established by McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP 965 (1973), and its progeny. The instant case basically fits in the analytical category of retaliation. In order to establish a prima facie retaliation case, the complainant must show that he engaged in protected activity, that the respondent was aware of this, and that he suffered an adverse employment action under circumstances giving rise to an inference of unlawful motivation. The respondent then must articulate a legitimate, non-discriminatory rationale for its action, and the complainant attempts to show that this rationale is pretextual. Grant v. Bethlehem Steel Corp., 622 F.2d 43, 22 FEP 1596 (2d Cir., 1980).

Here, the complainant has shown he engaged in protected activity -- refusing to deliver the sulfuric acid on June 18, 1985, and sending a copy of his June 24, 1985, memo to DILHR -- of which the respondent was aware. Shortly thereafter he was discharged. The close proximity in time between the protected activity and the discharge is sufficient to establish the third element of the prima facie case. Grant v. Bethlehem Steel Corp., supra.

The respondent has articulated a legitimate, non-discriminatory basis for the termination, citing the complainant's poor or insubordinate attitude, as manifested in several incidents and conversations apart from the protected activity, and denying that the protected activity played any role in the termination.

With particular respect to the complainant's refusal to deliver the sulfuric acid, respondent stresses that when Mr. Kuykendall was presented with complainant's refusal, he essentially acceded to it and told complainant he would get someone else to make the delivery. However, the memo which Mr. Kuykendall sent the complainant on June 20th (Complainant's Exhibit 7) contains language which makes it clear that Mr. Kuykendall felt that the complainant's refusal to make the delivery was improper. For example, the memo includes the following:

> "This memo is to affirm the problems that I addressed in our meeting this morning. Those, again, are your work attitude and unwillingness to perform your required duties.
>
> ***
>
> ... All items received by Central Receiving must and will be delivered as required. There will be no exceptions." (emphasis added)

If Mr. Kuykendall did not feel the complainant's refusal to deliver the sulfuric acid on June 18th to have been improper, it is hard to understand why he made these kinds of sweeping statements, without any attempt to point out that his criticisms did not encompass the June 18th incident, or that complainant had certain rights under the law with respect to certain dangerous tasks.

The respondent also denies that complainant's action in sending a copy of his June 24th memo (Complainant's Exhibit 8) to DILHR was a factor in

its decision to terminate him. However, this denial is inconsistent with the testimony of Mr. Burghaus, who ultimately approved the termination, concerning this letter.

While Mr. Burghaus conceded that complainant had a right to have sent the document to DILHR, he obviously felt strongly that complainant at least should first have pursued this as far as he could within the university. His disapproval of complainant's approach is amply illustrated by a few excerpts from Mr. Burghaus's testimony from the hearing tape about the June 26th meeting with the complainant:

Q. Did you mention any concerns to David over his having contacted DILHR?

A. You bet.

Q. Could you explain what those concerns were?

A. My main concern was that if there were any concerns that David had regarding safety, his immediate supervisor's the one that must be contacted, because I felt we did not have any chance to take a look into that situation and take corrective action, because if there were anything of a safety nature had to be called to DILHR's attention, I would support anything where there's a safety violation.

Q. OK, so are you saying then that an employe in your department can not contact DILHR?

A. I did not say that.

Q. Prior to contacting the supervisor?

A. I told him I said you have to work with the people on this campus, and we work together as a team, and if you work with us, we will rectify those situations. But, I don't have a chance, Mark Rehrauer doesn't have a chance, to take that corrective action. I said you're creating in a situation where -- you have to deal with these people, and it's just a matter of relationship with a fellow worker, a respect for supervisor.

Q. Now, you mentioned that an employe must contact their immediate supervisor, I believe was the word you used, about safety concerns.

A. Must, as far as I'm concerned, must.

Q. Again, I get back to, does that mean they can not contact DILHR until they do contact the supervisor?

A. No.

Clearly, §101.055, Stats., affords an employe such as the complainant the right to register a safety concern with DILHR without first exhausting the matter with his employer. Also, it can be inferred from the face of complainant's June 24th memo that he had at least raised his safety concerns with his immediate supervisor before copying DILHR. When these factors are considered along with Mr. Burghaus's criticisms of the complainant for having sent a copy of his memo to DILHR, it is obvious that Mr. Burghaus disapproved of complainant's communication with DILHR.

Given his supervisors' disapproval of these actions by complainant, and the fact that according to the notice of termination he was discharged because of his attitude and his unwillingness to perform required duties, it must be concluded that complainant's protected activities played at least some role in his termination.

While the Commission believes that complainant's termination was based in some part on his protected activities, it also believes there were substantial independent reasons for the discharge, apart from the protected activity.

In many respects, complainant's attitude toward management could be characterized as contentious and even in some respects contumacious. For example, he continuously insisted that he was not required to perform duties that were not enumerated on his position description, despite management's assertion to the contrary. After he received his supervisor's memo of June 20, 1985 (Complainant's Exhibit 7), he told Mr. Kuykendall that the document would make good toilet paper. After his supervisor

confronted him on June 27, 1985, and told him his shorts were unsatisfactory and inappropriate, he continued to wear them the next day, stressing at the hearing that he believed he was not subject to the dress code for permanent employes, and that Mr. Kuykendall's remarks did not constitute a "direct order" not to wear shorts.

There is no reason to think that management's stated concern about these matters was pretextual. What we have are a number of legitimate reasons for termination accompanied by two discriminatory reasons -- complainant's refusal to deliver the sulfuric acid drum and his transmittal of a copy of his June 24th memo to DILHR.

At this point, the commission must consider the question of the extent of causation played by the protected and the non-protected activities in complainant's termination[3]. According to 29 CFR §1977.6, in order to establish a violation of OSHA, it must be found that the protected activity, "was a substantial reason" for the termination, or that the termination "would not have taken place 'but for' the protected activity." It is helpful, in applying this formulation to the facts of this case, to consider the federal cases which are specifically cited in the body of the federal regulation.

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[3] Arguably, the respondent at this point has the burden of proof to establish that the protected activity was not a substantial reason for the termination, or that the termination would have taken place even in the absence of the protected activity. Cf. Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 484, 97 S. Ct. 568 (1977); Marshall v. Commonwealth Aquarium, 469 F. Supp. 690, 692 (D. Mass. 1979); affd., 611 F.2d 1 (1st Cir., 1979). However, since the commission would reach the same result regardless of the allocation of the burden on this point, it is unnecessary to address this issue.

In Goldberg v. Bama Manufacturing Corp, 302 F.2d 153 (5th Cir. 1962), a case involving the Fair Labor Standards Act, the complainant filed certain complaints of wage and hour violations. As soon as the employer learned of this, the following transpired:

> "He [the employer] then held a meeting of the employes at which he stated that he thought he knew who had called the Employment Office and he wanted that person to resign. Cotney [the employer] had heard from indirect sources that Mrs. Powell had made the complaint. When she did not resign and reported to work the next day, he again threatened the employes by saying that the employe who had made the 'false statement' must resign. August 25 he discharged Mrs. Powell." 302 F.2d at 154.

At the trial, there was substantial evidence presented that Mrs. Powell was not a satisfactory employe. While the employer testified that "these things were in his mind when he discharged her . . . ," other witnesses testified that he had not been informed of several of her actions until after she had been discharged. Under these circumstances, the court stated that "the immediate cause of her discharge was the assertion of a statutory right. . . ." id.

Mitchell v. Goodyear Tire and Rubber Co., 278 F.2d 562, 565 (8th Cir. 1960), also involved a proceeding under the Fair Labor Standards Act. The court relied on a number of factors in reversing the trial court's finding that the discharge of the employe (Cole) was not in any way related to his letter to the Wage-Hour division:

> 1) ". . . the testimony of defendant's store manager, Grantham, reveals that he called Cole into his office specifically to ask if he had complained to the Wage-Hour authorities, and his directness of purpose was unequivocal. 'The morning I fired M.C., I did not know exactly whether or not he had talked to the Wage-Hour people or not. I had heard it rumored. I asked M.C. point blank if he had done so. . . .'"
>
> 2) ". . . Grantham admitted he had not intended to discharge Cole on that day for any other reason and there is no testimony whatever in the record that his conversation at that time included any discussion of what were claimed at

> the trial to be Cole's shortcomings, nor did Grantham, at the time of firing Cole, ascribe any such reasons for his discharge. . . ."

The Court went on to state:

> "Plainly, all that had occurred was that Grantham had just learned of Cole's complaint to the Wage & Hour authorities. Whether this fact alone motivated Grantham or whether it was, as defendant's counsel suggested, the straw that broke the camel's back, the unavoidable inference is that Grantham's action was prompted by knowledge of Cole's complaint. Since these facts unambiguously and admittedly show that Cole would not have been discharged at that particular time but for his admission of authorship of the letter of complaint, this evidence, per se, established a violation of the plain terms of §15(a)(3), which makes it unlawful 'to discharge or in any other manner discriminate against an employee because such employee has filed any complaint.'" (emphasis added).

On the record before the Commission, the respondent had a number of concerns about the complainant's attitude beyond the two instances of protected activity.

The complainant continually asserted his opinion that he did not have to perform tasks that were not set forth on his position description, even after his supervisors insisted otherwise. This point can be illustrated by a number of references in the complainant's exhibits, as well as in other places in the record.

Complainant's Exhibit 7, memo of June 20, 1985, from Kuykendall to Strupp:

> ". . . we need to maintain an attitude of what can we do to best serve this campus, not an attitude which you have displayed of 'I'm not required to do this work in my position description.'"

Complainant's Exhibit 8, memo from Strupp to Burghaus dated June 24, 1985:

> "As for my job description, in a discussion following my refusal to move the containers Kuykendall stated that a willingness to 'go beyond' the job description that was furnished to me might be a necessity to gain permanent status. At that time I informed him that I disagreed with the point of view. . . ."

Complainant's Exhibit 9, letter to DILHR from Strupp dated June 24, 1985:

> "So who do I voice my concern to when I am asked to perform a task that I feel is not only unsafe but outside of the job description that I was furnished with when I began. . . ."

In addition to these incidents referred to in the foregoing exhibits, there was the incident that occurred on June 19, 1985, when Mr. Kuykendall asked the complainant if he had any suggestions as to how the delivery could be made in a safer manner, and complainant responded that that was not in his position description, and the June 24th meeting where the complainant continued to insist that he was not required to perform work not listed in his position description.

The respondent had a substantial basis for concern that the complainant's point of view on the conclusiveness of his position description would constitute a real problem of supervision,[4] particularly in the context of the other manifestations of complainant's attitude toward authority.

After complainant received Mr. Kuykendall's June 20th memo (Complainant's Exhibit 7), the complainant encountered him in the men's room and told him the memo would make good toilet paper. There can be no question but that management had a basis for substantial concern about this kind of insubordinate behavior.

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[4] Generally, a position description is only an outline of the duties and responsibilities of a position, cf. Alff v. DOR, Wis. Pers. Commn. 78-277, 243-PC (10-1-81) affirmed, Dane Co. Cir. Ct. Br.10, 81 CV 5489 (1-3-84), Ct. App. Dist. IV, 84-264 (11-25-85), and management is not limited in its assignment of duties and responsibilities to those reflected in the position description. Declaratory Ruling, Wis. Pers. Commn, 77-187 (6-1-81).

After Mr. Kuykendall confronted the complainant about wearing shorts to work, and told him his attire was unsatisfactory and inappropriate, Mr. Strupp continued to wear shorts the next day, later pointing out that he had not received a "direct order" not to wear shorts and that he believed he was not subject to the permanent employe dress code. Again there is a legitimate basis for management to have substantial concerns about complainant's attitude after an incident like this.

When all of these incidents are considered together, as well as other things like the incident of complainant's flareup with the student over the lunch break delivery, there are obvious grounds, excluding all protected activity, for management to question whether complainant should be retained as an employe and be given permanent status.

It is also important to remember, in evaluating the causation of the termination, that complainant was on probation, which is a trial period during which the employer can terminate an employe without having to demonstrate just cause, and with respect to which the employe has no appeal rights. Board of Regents v. Wisconsin Pers. Comm., 103 Wis. 2d 545, 309 N.W.2d 366 (1981). The commission is not called on in this case to determine whether the respondent had "just cause" to discharge the complainant. Rather, the question at this juncture in this case is whether there was a sufficient basis in non-protected activities to satisfy the test set forth in §29 CFR §1977-6 -- i.e., whether the protected activity was a "substantial reason" for the termination, or whether the termination "would not have taken place 'but for' engagement in protected activity."

Therefore, the commission is not called on, for example, to decide whether the complainant's reference to his supervisor's memo as "toilet

paper" would be a legitimate basis, in whole or in part for a discharge in the context of a just cause provision in a collective bargaining agreement, or pursuant to the civil service code, §230.34(1)(a), Stats., or, for that matter, whether any First Amendment rights would attach to such a comment. Rather, the Commission is called on to decide whether in fact the respondent did rely on this incident in its decision to terminate the respondent, and the extent to which this and the other non-protected activity constituted the basis for the termination, as compared to the protected activity.

Furthermore, when the facts of this case are compared to the facts of the cases cited in 29 CFR §1977-6, the non-protected activity here seems substantially more causal. It certainly is not of the "throw-in" nature as were the situations in those cases. It is also significant that management did not move toward termination of the complainant after the June 26th meeting, where Mr. Burghaus criticized complainant for having sent a copy of his June 24th memo to DILHR. It was only after the complainant openly defied Mr. Kuykendall in connection with the shorts incident did Mr. Kuykendall decide to pursue termination.

In conclusion, this record supports a finding that the respondent would have terminated the complainant in the absence of protected activity, and the protected activity was not a substantial reason for the termination.

ORDER

This complaint is dismissed.

Dated: _____,1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

AJT:jmf
CHRIS/3

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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