

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 LUCY CANTER (KIHLSTROM), *
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 Complainant, *
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 v. *
 *
 Chancellor, UNIVERSITY OF *
 WISCONSIN - MADISON, *
 *
 Respondent. *
 *
 Case No. 86-0054-PC-ER *
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 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on respondent's motions to limit the issues for hearing and to dismiss for failure to state a claim. The underlying complaint was filed pursuant to s. 230.85(1), Stats., commonly referred to as the whistleblower law. The complainant appealed from an initial determination of no probable cause. A prehearing conference was held on November 2, 1987 and the conference report states, in part:

The respondent contends that the complainant failed to disclose information as required by the whistleblower law. Complainant contends that she made written disclosures on the following dates:

- 1) January 31, 1986
- 2) February 3, 1986
- 3) February 7, 1986
- 4) March 19, 1986

The parties agreed to the following schedule for submitting written arguments on this question.

* * *

If, during the course of this schedule, either party feels that a hearing is necessary on this question, they will so advise the Commission and a second prehearing conference will be scheduled.

The facts set out below are not in dispute. These findings of fact are made solely for the purpose of ruling on respondent's motion.

FACTS

1. Complainant was appointed by Respondent as the Administrator for the Department of Neurology, UW Medical School, effective July 29, 1985, subject to annual renewal. Principal duties included general staff services supporting the Chairman, University accounting and budget, space management, financial planning, personnel administration, supervision of secretarial personnel and help with program developments.

2. Dr. Henry Schutta was the chair of the Department of Neurology and Complainant's supervisor.

3. Complainant submitted a summary of the Medical Illustration and Photography account to Dr. Schutta on January 31, 1986. Complainant gave a copy of the summary to Dr. Schutta, with an attached note which read:

If this is appropriate volume for a 6 month period then more \$ must be requested. If this is excessive, I'd like to have faculty input re policy. Thanks.

Dr. Schutta directed Complainant to bring the matter up for discussion at the next faculty meeting.

4. On February 3, 1986, Complainant wrote a memo to Dr. Brooks, a department faculty member, which read:

As you can see from the attached statement you have several outstanding invoices with Burkhalter Travel. The total amount due Burkhalter is \$2322.14.

She also wrote a memo to Dr. Schutta on February 3, 1986, which read as follows:

See memo & attachment please. Kim has informed me that Abbott was supposed to reimburse for some of these and in fact they reimbursed Dr. Brooks directly. Dr. Brooks has not paid Burkhalter. Kim does not know quite how to deal with Ben on this. I wrote him this memo in response to the situation.

The statement from the Burkhalter agency, dated January 26, 1986, indicated Dr. Brooks still owed \$2322.14 for tickets billed.

5. On February 7, 1986, Complainant wrote a memo to Dr. Schutta which read as follows:

Burkhalter Travel called and said that they are about to begin collection proceedings against the department due to Dr. Brooks' outstanding bills. We will receive an official letter which states that.

Dr. Schutta directed Complainant to bring the matter up at the staff meeting scheduled for later the same day.

6. The minutes of the Department of Neurology meeting held February 7, 1986, read in part:

9. Travel Agencies. Travel agencies will no longer issue tickets for neurology faculty without a credit card or check.

* * *

13. Medical Illustration and Photography Blanket Order. The blanket order (#7302735) for Medical Illustration and Photography has been closed as of 12/18/85.

- A. Any time a member of the faculty needs to have slides, etc made, he/she has to fill out a requisition for it.
- B. Any person who is a member of the VA faculty should have slides made at the VA.

7. Complainant placed a Burkhalter bill in Dr. Levine's mail box. In the afternoon on March 7, 1986, there was a confrontation between Dr. Levine and Ms. Kihlstrom in her office. Complainant reported the incident to Dr. Schutta.

8. On March 7, 1986 Dr. Levine wrote a memo to Dr. Schutta summarizing the matter.

9. On March 10, 1986 Dr. Levine wrote a note of apology to Complainant.

10. On March 10, 1986 Complainant wrote to Dr. Schutta tendering her resignation effective May 15, 1987.

11. On March 19, 1986 Complainant wrote a letter to Dr. Schutta indicating she wanted the incident with Dr. Levine "recorded" and that she was not filing formal charges.

12. On March 19, 1986, Complainant's attorney wrote a letter to Dr. Schutta containing the following two paragraphs:

My first advice to her had been that she inform you that Mr. Levine's threat to her job, based on his reaction to her concerns about budgetary behavior, justified the action which she took. Therefore, if the viewpoint that she provoked the outburst were to have prevailed, she would likely have a cause of action under Sec. 895.65 of the Wisconsin Statutes, commonly known as the "whistle blower" statute, but she would take no action at that point.

Since my earlier conversation with Ms. Canter, however, she has received an apology, and believes that you were instrumental in that. From the little I know, it sounds as if your first reaction was disorienting to Ms. Canter, but was misleading, and the situation has in subsequent days been handled very well by both you and Ms. Canter. She made the decision not to cause problems at that time, and you reacted sensitively to Mr. Levine's behavior. Ms. Canter tells me that she will be talking with you directly about the incident. I have advised her that their working relationship with you would at this time be best served by concentrating on that conversation with you, and continuing to do her job well.

13. Complainant filed a charge of discrimination with the Personnel Commission on April 15, 1986, in which she alleged she had been retaliated against by Respondent in violation of §230.81, Stats. The complaint included the following summary of the alleged retaliation:

After expressing my concern regarding budgetary behavior of two faculty members, I was verbally harassed and threatened by one of the faculty members (3-7-86). I disclosed information (3-10-86) to my attorney who composed a letter (3-19-86) to the Chairman listed above. On March 25, 1986 I received a letter of non-renewal. I believe that my non-renewal was a retaliatory act based on whistleblowing. I am requesting relief.

OPINION

The respondent's motion for failure to state a claim requires the Commission to analyze the complainant's allegations liberally in favor of the complainant and to grant the motion only if it appears with certainty

that no relief can be granted. See, generally State v. American TV, 140 Wis. 2d 353 (Court of Appeals, 1987).

The relevant provisions of the whistleblower law read:

230.80 Definitions. In this subchapter:

* * *

(5) "Information means information gained by the employe which the employe reasonably believes demonstrates:

- (a) A violation of any state or federal law, rule or regulation.
- (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

* * *

(9) "Substantial waste of public funds" means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

* * *

230.81 Employe disclosure. (1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:

- (a) Disclose the information in writing to the employe's supervisor.

* * *

(3) Any disclosure of information by an employe to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

Respondent first contends that because the notes of January 31, February 3 and February 7, 1986 were not identified in the complaint filed on April 15, 1986, any hearing in this matter may not proceed on an issue which permits the complainant to allege that these notes constituted disclosures under the law.

The whistleblower law, in s. 230.85(1), Stats., simply requires a complainant to "file a written complaint with the commission, specifying the nature of the retaliatory action or the threat thereof and requesting relief." The April 15th complaint clearly meets these statutory requirements. Although the statute does not require it, the complainant also alleged that she engaged in protected activities when she "express[ed her] concern regarding budgetary behavior of the two faculty members" and "disclosed information (3-10-86) to my attorney." There is nothing in either the statutes or the Commission's rules that would require a complaint to include complete identification of all protected conduct serving as a basis for a retaliation claim. Therefore, the first part of respondent's motion must be denied.

The respondent also contends that the January 31, February 3 and 7 notes and the March 19th letter do not constitute disclosures under s. 230.81(1)(a), Stats.

As to the March 19th letter, there is no need that it constitute a lawful disclosure under s. 230.81(1)(a), Stats. Pursuant to s. 230.81(3), Stats., a verbal or written disclosure of information by an employe to his or her attorney is a "lawful disclosure" and retaliation against the employe for having made that disclosure to the attorney is prohibited by the law. The March 19th letter was not itself a disclosure but merely served, inter alia, to inform the respondent of complainant's contention that she had engaged in a protected activity. There may be a dispute between the parties as to whether the complainant disclosed "information," as defined in s. 230.80(5), Stats., to her attorney. However, the parties' briefs provide no basis on which to conclude that complainant did not disclose such information to her attorney. A determination of that issue

must be left to a hearing where the parties have an opportunity to offer testimony.

As to the January 31, February 3 and 7 notes, it is a closer question. However, the Commission also concludes that it is unable to grant respondent's motion based on the undisputed facts. Clearly, if the complainant were to have relied on verbal statements to her supervisor, respondent's motion would be granted. Here, however, the communications were written. The difficulty is in determining whether they constituted disclosures of information. The Commission can conceive of circumstances where written communications, such as the January 31 and February 3 and 7 notes, though neutral on their face, would act to inform the reader that the writer wished to identify improper governmental activities. Those circumstances would need to be established by evidence proffered at hearing. Among the facts that the parties may seek to establish are: the manner the complainant normally informed her supervisor of telephone calls received; whether the respondent had any responsibility in the event staff declined to pay their travel expenses with Burkhalter; the frequency and circumstances under which the complainant audited funds; and whether her supervisor was made aware of any such audits. In terms of the March 19th correspondence from complainant's attorney, one relevant question would be the respondent's understanding as to what information the complainant may have disclosed to her attorney. There appear to be disputes between the parties as to whether the complainant could have reasonably believed that mismanagement or a substantial waste of public funds had occurred.

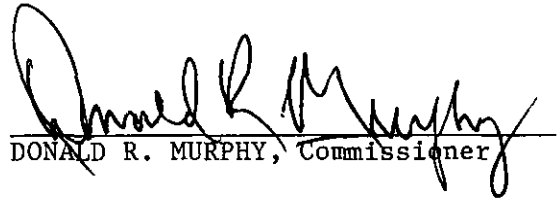
For the above reasons, the Commission issues the following

ORDER

Respondent's motion to dismiss is denied. During the hearing on probable cause, the respondent may reassert its contention that the complainant made no lawful disclosure of information.

Dated: June 8, 1988 STATE PERSONNEL COMMISSION

KMS:rcr
DPM/2


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

Parties:

Lucy Canter Kihlstrom
4450 N. Paseo de los Cerritos
Tucson, AZ 85745

Donna Shalala
Chancellor, UW
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706