

KENNETH VANDER ZANDEN,
Plaintiff,

vs.

DEPARTMENT OF INDUSTRY, LABOR and
HUMAN RELATIONS.
Defendant.

D E C I S I O N

CASE # 88 CV 1223

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Personnel
Commission

This case is before the court on an administrative review, under to chapter 227 Wis. Stats., of the Personnel Commission's Final Decision and Order which dismissed Plaintiff's complaint.

The dispute concerns the interpretation of the phrases "retaliatory action" and "disciplinary action" in Wis. Stats. 230.80 through 230.89 created by 1983 Wis. Act 409 and commonly known as the "Whistleblower Act".

Statutory construction presents a question of law. In re Paternity of S.J.K., 132 Wis. 2d 262, 264, 392 N.W.2d 97, 98 (Ct. App. 1986). A court is generally not bound by an administrative agency's conclusions of law. See Department of Revenue, 123 Wis. 2d at 242, 365 N.W.2d at 918. However, an administrative agency's conclusions regarding statutory interpretation and application are entitled to deference on appeal when the agency's experience, technical competence and specialized knowledge aid in its interpretation. Robert Hansen Trucking, Inc. v. LIRC, 126 Wis. 2d 323, 331, 377 N.W.2d 151, 155 (1985).

With that standard of review in mind we turn to the case at hand. To prevail Plaintiff must prove that: he disclosed information as provided in § 230.81 Stats; the disclosed information is of the type defined in § 230.80(5) Stats; the alleged retaliator was aware of the disclosure; and the Plaintiff suffered a retaliatory action as defined by § 230.80(8). The Commission's Final Decision and Order found that the conduct complained of is not a "disciplinary action" within the meaning of § 230.80(2). This court agrees. If Complainant was not the subject of a disciplinary action than he cannot prove a retaliatory action.

Retaliatory actions are defined in § 230.80(8) as disciplinary actions.

"(8) 'Retaliatory action' means a disciplinary action taken because of any of the following:
(a) The employe lawfully disclosed information under § 230.85(1).
(b) The employe testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under § 230.81 by another employe.
(c) The appointing authority, agent of an appointing authority or supervisor believes the employe engaged in any activity described in par. (a) or (b)."

A disciplinary action is defined in § 230.80(2) as:

"(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.

The alleged conduct does not come under any of the specific "penalties" listed in § 230.80(2) but the question is whether the general language "including but not limited to" encompass as conduct such as this?

"The primary source of statutory construction is the language of the statute itself. If the language of the statute is clear on its face, the court is precluded from referring to extrinsic sources to aid in interpreting that language. Empire Gen. Life Ins. Co. v. Silverman, 135 Wis. 2d 143, 151, 399 N.W.2d 910, 913 (1987).

The commission examined the language of the statute and also applied the maxim ejusdem generis. This rule of statutory construction applies not only when a general term follows a list of specific things, but also where, as here, a list of specific words follows a more general term, Swanson v. Health and Social Services Dept. 105 Wis. 2d 78, 85, 312 N.W.2d 833 (Ct.App. 1981). The rule provides that the general term applies only to things that are similar to those specifically enumerated. All of the enumerated disciplinary actions or penalties have a substantial or potentially substantial negative impact on an employee. The limitations imposed on Plaintiff's contacts with the Oshkosh Job Service office, while perhaps annoying and perhaps an example of poor management practices bordering on childishness, do not rise

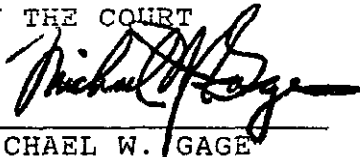
to the level of a penalty or a disciplinary action akin to those enumerated in § 230.80(2). The common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform ones job efficiently. Plaintiff was not the "victim" of retaliation. His disclosure resulted in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline.

Therefore, because there is no finding of disciplinary action and, hence, no retaliatory action, Plaintiff is not entitled to the benefits of the presumption of a retaliatory action under § 230.85(6). The Commission's Final Decision and Order is affirmed.

Counsel for the prevailing party shall prepare Judgment dismissing petitioner/appellant's claim within 20 days.

Dated this 25th day of May, 1989.

BY THE COURT



MICHAEL W. GAGE
Circuit Court Judge
Branch V